

THE CONSTITUTIONAL WORLD OF  
MR. JUSTICE FRANKFURTER



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T H E  
*Constitutional World of*  
MR. JUSTICE  
FRANKFURTER

SOME REPRESENTATIVE OPINIONS

SELECTED AND EDITED

BY

SAMUEL J. KONEFSKY

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*New York: 1949*

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*First Printing*

PRINTED IN THE UNITED STATES OF AMERICA

*To*

MY SON ALFRED

## A C K N O W L E D G M E N T S

Throughout the preparation of this book, I have had the indispensable assistance of Mr. Gerald Gunther, a former student and now esteemed colleague. It is a pleasure to acknowledge my heavy debt to him.

To Miss Phyllis Karp, I am grateful not only for the expert typing but for the spirit in which she did it.

My wife deserves my thanks for helping to prepare the manuscript, reading proof, and for cheerfully taking on all the other burdens that are the final stages of publication.

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# I N T R O D U C T O R Y

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## I

"The good that Presidents do is often interred with their Administrations. It is their choice of Supreme Court justices that lives after them. The noisy battles of Roosevelt I still echo in the phrases he added to the language, but nothing else he did has had so much effect on our national development as the appointment of Justice Holmes. Wilson's Clayton Act and his Federal Trade Commission, of which so much was expected, stand as monuments to futility. But the Calvinistic stubbornness and righteous belligerency that crammed the nomination of Justice Brandeis down the throat of an unwilling Senate have continued to bear fruit in our constitutional law. We believe that in the perspective of history the appointment of Felix Frankfurter to the Supreme Court will not seem the least of Franklin Roosevelt's accomplishments.

"Prophecy in this field is hazardous. Our justices, like monarchs, are unpredictable quantities, and our constitutional history is full of surprises. Marshall did not prove as incompatible with Jeffersonianism in power as Adams expected. Taney went to the bench as a champion of the new democratic ferment under Jackson and died as the hated spokesman of the slaveholders. Lincoln's Field lived to be the most effective and ingenious reactionary ever to sit on the Court. Great scholars, like Story and Gray, have proved sterile on that bench; lawyers of little reputation, like Waite and Miller, creative. Wilson's trust-busting Attorney General, McReynolds, turned out to be a pillar of reaction; Coolidge's Attorney General, Stone, has developed a liberalism and a capacity for trenchant expression no one dreamed he possessed. Chief Justice Hughes, fresh from success as a Wall Street corporation lawyer, saved Herndon, de Jonge, and the Scottsboro boys. But other justices—Holmes, Brandeis, Cardozo—were known quantities before their nominations and fulfilled all that was expected of them. It is in this last category that we feel safe in placing Justice Frankfurter.

"Frankfurter's whole life has been a preparation for the Supreme Court, and his appointment has an aesthetically satisfying inevitability. No other appointee in our history has gone to the court so fully prepared

for its great tasks. His experience in government, from his first service as an Assistant United States Attorney in New York under Henry L. Stimson through his work in the War Labor Administration under Wilson, has been a wide one. His authoritative work, *The Business of the Supreme Court*, written in collaboration with James M. Landis, and the annual surveys of each session that he has contributed to the *Harvard Law Review* reveal an unequaled knowledge of the court's history, cases, and procedure. He is our foremost authority on administrative law, the law that has developed around our new regulatory agencies. He first assisted and then succeeded Brandeis as leader of the forces for minimum-wage legislation in this country. From the time he was instrumental in saving Mooney from execution to his defense of Sacco and Vanzetti, Frankfurter has shown his devotion to justice and his courage. Finally the respect and friendship he has won among people of many diverse and clashing social points of view are not an accident but the reflection of qualities essential in successful democratic government, the fruit of opinions pursued with moderation, of causes championed without fanaticism, and of controversies carried on without vindictiveness. If any man can help to lessen the asperities inevitable in an age of transition such as ours, if any one man can help to prevent a new irreconcilable conflict, that man is Frankfurter. There will be no Dred Scott decisions from a Supreme Court on which he sits.

"Mr. Roosevelt gave the court new vitality with the appointment of Black; he gives it new and rich talents for conciliation, adjustment, and statesmanship in Frankfurter. We congratulate the President on having made the right and unmistakable choice to fill the seat held by Cardozo and before him by Holmes."

—*The Nation*, Jan. 14, 1939 (editorial)

"Nearly a decade ago Felix Frankfurter and Nathan Greene dedicated a volume on the labor injunction to Justice Brandeis, for whom, they wrote, 'law is not a system of artificial reason but the application of ethical ideals, with freedom at the core.' Now Mr. Frankfurter comes before the nation as a Presidential nominee to the Supreme Court. We think the words he has written, the cause he has pleaded, the record of his life and character justify the confident hope that he, too, will read our fundamental law as a system of 'ethical ideals, with freedom at the core.'

"Professor Frankfurter has never shrunk from conflict if conflict were, as he saw it, the only road to justice. He stood like a rock against the weight of conservative opinion in Massachusetts and elsewhere when he took up the cause of Sacco and Vanzetti. But he did so because he cherished an older and more glorious conservatism—the integrity of human

rights. Rightly or wrongly, he believed that the two men had been convicted on insufficient evidence and had been denied a proper rehearing.

"But the fighter, the keen observer of human affairs, the adviser of men in public life, is also a student, a philosopher, profoundly learned in the law, deeply reverent of those basic elements in the law which reconcile the freedom and dignity of the individual with the stability of society, deeply skeptical of panaceas and nostrums. Mr. Frankfurter's friends have known that he is no uncritical follower of the New Deal, that he has opposed many of its policies, and that the ascription to him of a whole portfolio of controversial measures adopted since 1933 is absurd. His appointment is a tribute to his independence as well as to the President's ability to recognize worth and achievement. That members of his own profession, of whatever political party, recognize his standing was shown in a survey conducted by Dr. Gallup last September, in which he led his nearest rivals by five to one as a candidate preferred by lawyers for the place to which he has now been appointed.

"Over and over again he has stated his view of the law as an organic, growing thing; sharing in this respect the philosophy of the two judges whom he has seemed most to admire: Holmes and Brandeis. His words speak both for himself and for his lofty conception of the task to which he has now been called:

"The court is the brake on other men's actions, the judge of other men's decisions. . . . The successful exercise of such judicial power calls for rare intellectual disinterestedness and penetration, lest limitations in personal experience and imagination operate as limitations of the Constitution"

"That he will serve no narrow prejudice, that he will be free from partisanship, that he will reveal the organic conservatism through which the hard-won victories won liberty in the past can yield a new birth of freedom, that he will vent no spite, that he will stand firmly for progress under law, none who know him or his work can doubt. He will join the so-called liberal wing of the court, but, no more than Holmes or Brandeis, Stone or Cardozo, will be stultified by dogma.

"His confirmation should follow as a matter of course. Even those whose interpretations of democratic law differ from his must recognize that he will add to the strength and dignity of a court which must, in the phrase he ascribed to Justice Holmes, earn reverence through the test of truth."

—*New York Times*, Jan. 6, 1939 (editorial)

\* *Mr. Justice Holmes and the Supreme Court* (1938).

"The fact is that the Court, which throughout its history has always tended, like the amoeba, to split in two, is splitting again now. And incredible as it may sound to some, the leader of the Court's new conservative camp is none other than . . . ex-Professor Felix Frankfurter."

—FRED RODELL, in *Harper's Magazine*, Oct., 1941, p. 449

"Those who have wrongly assumed . . . that Mr. Justice Frankfurter is a fallen liberal angel should at least be convinced . . . that liberalism in a judge is not to be tested solely by the result of a particular adjudication and that one facet of liberalism in a judge may be the insistence that courts should not interpose their vetoes except under the strongest constitutional compulsions."

—THOMAS REED POWELL, in 29 *Iowa Law Review* 383 (Mar. 1944)

"It is a matter of common knowledge that the way of the Court with a case has changed . . . The very feel of the opinions distinguishes the New Court from the old. The Four Horsemen plus Roberts and/or Hughes were honest and bold in their attempt to turn the hands of the clock back. If they did not like coal control, the minimum wage, or relief for dirt farmers, they said so by directly reading their prejudices into the constitution. On the present Court, Vinson, C.J., and Frankfurter, Jackson and Burton, JJ., often joined by Reed, J., arrive at a kindred result by finding—or devising—ways to prevent the substantive question from being reached. . . . Such instances—and they are legion—indicate a state of mind so esoterically judicial that a slight deviation from correct procedure—often existing only in the mind of the justice—is a mortal sin, while a serious miscarriage of justice is only a venal one.

"A mythology has been created in defense of the lapse of the Court from the great tradition of the law. It is that the two wings of the present Court represent an 'activist' and a 'legal' attack upon the cases. Thus Black, Douglas, Murphy and Rutledge, JJ., play their economic preferences, while Vinson, Frankfurter, Jackson and Burton, JJ., are content to sit back and refer the cases to 'the law.' . . . It does have a bit of oblique truth; for Douglas, Black, *et al.* have competence in the discussion of substantive questions, while Frankfurter chooses to operate in the procedural field where he has confidence in his own footing. . . . If a shift is made from the rhetoric in which they are cast to the rationale of decision, the difference in motivation between the two groups fades. Frankfurter affects a lack of concern for the 'end product'; yet his votes are to be predicted in terms of the end product. You can almost always tell where he is coming out; yet not even the faithful can tell in advance how his stand is to be legalized. Frankfurter spurns 'policy' and pro-

fesses to lay the law down on the line. Yet he usually gets to the same place as Jackson whose law is not unspotted by the world. . . .

" . . . It was the law journals, reversing the decisions of the Supreme Court, which led the fight on the Old Court. The nine young men have been subjected to no such critical and disinterested bombardment. A host of truths, quite ugly truths, need to be spoken. It does no good to impute personal blame. Mr. Justice Frankfurter has no feel for the dominant issues; he operates best when weaving crochet patches of legalism on the fingers of the case. He does the best he can, often very well indeed, with the techniques in which he is proficient; it is a calamity that his skills happen to be petty skills. He is the victim of a bad legal education; but the Court has no business allowing him to select, from all the issues the case holds, the question upon which it must turn. The Old Court may have been any bad thing you wish to call it; but in backwardness it was bold and did not hide its naughtiness behind a curtain. The New Court is a lion in condemning iniquity, and a lamb in putting an effective stop to it . . . But, in a retreat from old ways, a respect for the province of the legislature does not carry an immunity to judicial responsibility."

—WALTON HAMILTON, in *56 Yale Law Journal* 1459–60 (Sept., 1947)

"Neither of these men [Holmes and Frankfurter] could be counted upon to deliver a judgment for the reason that it immediately implemented some accepted tenet of the liberal legislative program. But it is demonstrable, I believe, that Mr. Justice Frankfurter is in this sense no more a conservative than he is a liberal. It is of the very essence of his judicial philosophy that his role as a judge precludes him from having a program couched in these terms of choice."

—LOUIS L. JAFFE, in *62 Harvard Law Review* 358 (Jan., 1949)

## II

It is now more than twelve years since Franklin D. Roosevelt's ill-fated effort to reform the Supreme Court by enlarging its membership was rejected by an aroused Congress. But through deaths and resignations he was able in time to name eight Associate Justices and even to designate a Chief Justice. A tribunal thus dominated by men owing their commissions to the same President, it was feared by some, would sooner or later degenerate into a rubber stamp for the New Deal, speaking as if with one voice while obliterating cherished landmarks of the law.

Not many years were to elapse, however, before it became quite clear

that no such unanimity of opinion existed within the Roosevelt Court. On the contrary, the close votes and sharp dissents which soon made their appearance disclosed serious constitutional differences and personality clashes. As early as the spring of 1941, when the Roosevelt appointees constituted but a bare majority, it was already obvious that they did not see eye to eye on many fundamental issues. Indeed, in the October, 1943, term, for the first time in the Court's history, the cases in which the Justices were in disagreement outnumbered those decided unanimously. Often accompanied by considerable verbal fencing, these dissensions are proof enough that party labels and past associations are not always reliable as guides to the conduct of a future Justice.

Of all the men serving by appointment of Mr. Roosevelt, Felix Frankfurter is probably the one whose record on the Court has caused most surprise. Many of those remembering him from the days of his association with liberal causes and publications have the impression that his work on the Court is inconsistent with the reputation he had earned for himself. As a judge he has disappointed in particular liberal and labor circles.

When the United States Supreme Court adjourned in June of 1949, Felix Frankfurter had completed more than ten years of service as an Associate Justice. To be exact about it, he assumed his judicial duties on January 30, 1939. The mere passing of a decade may be no excuse for bursting into print with a collection of his utterances from the bench; but the period covered is long enough to justify the effort even from the standpoint of time, considering especially the highly articulate and prolific personality who is their author.

There are, however, more cogent reasons why Mr. Justice Frankfurter's opinions should be published. The first is that he is without doubt the most controversial figure on the Court today, the object of warm praise and bitter—in some instances, even vituperative—denunciation. What Walton Hamilton said of him in 1944 is still true: "Frankfurter . . . is the current storm center." Many thoughtful observers find it difficult to reconcile much of Justice Frankfurter's judicial activity with the very ideas and values he himself professed for more than a quarter of a century—a course of thought and action which led a liberal President to choose him as Cardozo's successor.

While his failure to live up to the expectations of some of his former admirers is undoubtedly the basic reason for their disillusionment, it is nevertheless true that he is in part a victim of the hideously inadequate reporting which Supreme Court cases receive in newspapers and periodicals. Both his detractors and his defenders would do well by reading Justice Frankfurter's opinions for themselves; but it may be assumed that the pressure of affairs keeps many of them from consulting

the official United States Reports. My purpose has been, therefore, to select the more significant and representative of his opinions and to make them available in a readily accessible and convenient form.

The fact that anything Justice Frankfurter has to say is said well and interestingly is, of course, another justification for bringing together his opinions. As Archibald MacLeish wrote in 1939 in the foreword to a collection of Mr. Frankfurter's magazine articles and occasional papers, "Few scholars, and few scholars of the law, have written a more natural, more lucid or more readable English than Mr. Frankfurter writes at his best."<sup>1</sup> His immense erudition and fine style are also evident in his judicial opinions. (I have used ellipses to indicate omissions from the text—a line of periods marks the omission of one or more complete paragraphs—and a parenthetic asterisk wherever a footnote has been omitted.)

### III

Professor Frankfurter once observed that a judge's "intellectual history" prior to his appointment is often "largely unrecoverable." The opposite, to be sure, is true about himself; but obviously much depends upon what one thinks the history of his pre-judicial career signifies. In view of the discussion of that career in the first two quotations with which this introductory statement opens and the insights they exhibit, no more than a chronology would seem to be required before turning to his pronouncements as a member of the Supreme Court.

Felix Frankfurter was born in Vienna on November 15, 1882, and came to the United States at the age of twelve. In 1902 he received his B.A. from the College of the City of New York; a year later he entered the Harvard Law School, from which he was graduated in 1906. In the fall of that year began his association with Henry L. Stimson, who is still a cherished friend. Stimson was at the time United States Attorney for the Southern District of New York, and Frankfurter served on his staff for a period of five years.

When Stimson became Taft's Secretary of War in 1911, Frankfurter went along as Law Officer of the Bureau of Insular Affairs. Three years later he left government service to join the faculty of the Harvard Law School as Byrne Professor of Administrative Law.

In the first week of America's participation in World War I, Frankfurter was called to Washington to assist Secretary of War Newton D. Baker as adviser on industrial questions. He also served as Assistant to Secretary of Labor Wilson, his chief assignment being to act as Secretary and counsel to the President's Mediation Commission.

<sup>1</sup> *Law and Politics*, ed. A. MacLeish and E. F. Prichard, Jr. p. x.

In 1918 Frankfurter was made Chairman of the War Labor Policies Board, which also included Franklin D. Roosevelt, representing the Navy Department. The following year he married Marion A. Denman and resumed his work at Harvard, where he remained until he was named to the United States Supreme Court, except for a year he spent at Oxford as visiting professor. In 1932 he declined appointment to the Supreme Judicial Court of Massachusetts, preferring to remain in legal education.



THE CONSTITUTIONAL WORLD OF  
MR. JUSTICE FRANKFURTER



## JUDICIAL POWER HAS ITS LIMITATIONS

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"OUR EXCLUSIVE BUSINESS IS LITIGATION"

*Coleman v. Miller*

307 U.S. 433, 460 (1939)

Twice foiled by the Supreme Court's invalidation of its efforts to end the use of child labor in industry, Congress in 1924 finally submitted to the states for ratification a constitutional amendment authorizing it in more explicit terms to legislate on the subject. Granted the temper of the twenties, it is perhaps not surprising that by the end of 1931 the proposed amendment had been rejected by the legislatures of nineteen states and ratified by only six. But as unemployment mounted in the years of the depression, the campaign to secure adoption of the Child Labor Amendment was greatly intensified, with the result that some states which had voted against it now voted for it. One of these was Kansas, which rejected the Amendment in 1925 but reversed itself twelve years later.

When the concurrent resolution ratifying the amendment was before the Kansas Senate in January, 1937, twenty of the forty Senators present voted for its adoption and twenty against it. The resolution was saved when the Lieutenant Governor, as presiding officer, voted for it. After it was also passed by the Kansas House of Representatives, twenty-one members of the state Senate and three members of the lower house petitioned the Kansas Supreme Court for a writ of mandamus to restrain state officials from certifying the ratification of the Amendment. They challenged the right of the Lieutenant Governor to cast the deciding vote and argued that the Child Labor Amendment failed of

adoption as soon as one more than one-fourth of the states had rejected it.

The Kansas court denied the writ of mandamus and held that the resolution of ratification had been duly adopted by both houses of the legislature. Its judgment was affirmed by the United States Supreme Court. All the members of the Court except Justices Butler and McReynolds agreed that whether a state legislature may ratify an amendment to the Federal Constitution, which it had previously rejected, and what constitutes a reasonable time within which such an amendment is to be ratified, are "political" questions, to be determined by Congress and not the courts. They differed sharply, however, over the Court's jurisdiction to hear the controversy. Questions relating to the federal amending process are "exclusively federal questions," said Chief Justice Hughes in his opinion for the Court. Accordingly, the Court may review the decision of the Kansas Supreme Court, since the Senators who had brought the mandamus action had a "plain, direct and adequate interest in maintaining the effectiveness of their votes."

Four of the Justices—Roberts, Black, Frankfurter, and Douglas—took the position that the members of the Kansas legislature had no "standing" to invoke the jurisdiction of the Court, and Mr. Justice Frankfurter was their spokesman on this issue in the following concurring opinion:

. . . . .

In endowing this Court with "judicial Power" the Constitution presupposed an historic content for that phrase and relied on assumption by the judiciary of authority only over issues which are appropriate for disposition by judges. The Constitution further explicitly indicated the limited area within which judicial action was to move—however far-reaching the consequence of action within that area—by extending "judicial Power" only to "Cases" and "Controversies." Both by what they said and by what they implied, the framers of the Judiciary Article gave merely the outlines of what were to them the familiar operations of the English judicial system and its manifestations on this side of the ocean before the Union. Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster and only if they arose in ways that to the expert feel of lawyers constituted "Cases" or "Controversies." It was not for courts to meddle with matters that required no subtlety to be identified as political issues. (\*) And

even as to the kinds of questions which were the staple of judicial business, it was not for courts to pass upon them as abstract, intellectual problems but only if a concrete, living contest between adversaries called for the arbitrament of law. . . .

As abstractions, these generalities represent common ground among judges. Since, however, considerations governing the exercise of judicial power are not mechanical criteria but derive from conceptions regarding the distribution of governmental powers in their manifold, changing guises, differences in the application of canons of jurisdiction have arisen from the beginning of the Court's history. (\*) Conscious or unconscious leanings toward the serviceability of the judicial process in the adjustment of public controversies clothed in the form of private litigation inevitably affect decisions. For they influence awareness in recognizing the relevance of conceded doctrines of judicial self-limitation and rigor in enforcing them.

. . . . .  
... To whom and for what causes the courts of Kansas are open are matters for Kansas to determine. (\*) But Kansas can not define the contours of the authority of the federal courts, and more particularly of this Court. It is our ultimate responsibility to determine who may invoke our judgment and under what circumstances. Are these members of the Kansas legislature, therefore, entitled to ask us to adjudicate the grievances of which they complain?

It is not our function, and it is beyond our power, to write legal essays or to give legal opinions, however solemnly requested and however great the national emergency. . . . Unlike the rôle allowed to judges in a few state courts and to the Supreme Court of Canada, our exclusive business is litigation. (\*) The requisites of litigation are not satisfied when questions of constitutionality though conveyed through the outward forms of a conventional court proceeding do not bear special relation to a particular litigant. The scope and consequences of our doctrine of judicial review over executive and legislative action should make us observe fastidiously the bounds of the litigious process within which we are confined. (\*) No matter how seriously infringement of the Constitution may be called into question, this is not the tribunal for its challenge except by those who have some specialized interest of their own to

vindicate, apart from a political concern which belongs to all. . . .

In the familiar language of jurisdiction, these Kansas legislators must have standing in this Court. What is their distinctive claim to be here, not possessed by every Kansan? What is it that they complain of, which could not be complained of here by all their fellow citizen? The answer requires analysis of the grievances which they urge.

They say that it was beyond the power of the Kansas legislature, no matter who voted or how, to ratify the Child Labor Amendment because for Kansas there was no Child Labor Amendment to ratify. Assuming that an amendment proposed by the Congress dies of inanition after what is to be deemed a "reasonable" time, they claim that, having been submitted in 1924, the proposed Child Labor Amendment was no longer alive in 1937. Or, if alive, it was no longer so for Kansas because, by a prior resolution of rejection in 1925, Kansas had exhausted her power. In no respect, however, do these objections relate to any secular interest that pertains to these Kansas legislators apart from interests that belong to the entire commonalty of Kansas. The fact that these legislators are part of the ratifying mechanism while the ordinary citizen of Kansas is not, is wholly irrelevant to this issue. On this aspect of the case the problem would be exactly the same if all but one legislator had voted for ratification.

Indeed the claim that the Amendment was dead or that it was no longer open to Kansas to ratify, is not only not an interest which belongs uniquely to these Kansas legislators; it is not even an interest special to Kansas. For it is the common concern of every citizen of the United States whether the Amendment is still alive, or whether Kansas could be included among the necessary "three-fourths of the several States."

These legislators have no more standing on these claims of unconstitutionality to attack "Senate Concurrent Resolution No. 3" than they would have standing here to attack some Kansas statute claimed by them to offend the Commerce Clause. By as much right could a member of the Congress who had voted against the passage of a bill because moved by constitutional scruples urge before this Court our duty to consider his arguments of unconstitutionality.

Clearly a Kansan legislator would have no standing had he brought suit in a federal court. Can the Kansas Supreme Court

transmute the general interest in these constitutional claims into the individualized legal interest indispensable here? No doubt the bounds of such legal interest have a penumbra which gives some freedom in judging fulfilment of our jurisdictional requirements. The doctrines affecting standing to sue in the federal courts will not be treated as mechanical yardsticks in assessing state court ascertainment of legal interest brought here for review. For the creation of a vast domain of legal interests is in the keeping of the states, and from time to time state courts and legislators give legal protection to new individual interests. Thus, while the ordinary state taxpayer's suit is not recognized in the federal courts, it affords adequate standing for review of state decisions when so recognized by state courts. . . .

But it by no means follows that a state court ruling on the adequacy of legal interest is binding here. Thus, in *Tyler v. Judges*, 179 U.S. 405, the notion was rejected that merely because the Supreme Judicial Court of Massachusetts found an interest of sufficient legal significance for assailing a statute, this Court must consider such claim. Again, this Court has consistently held that the interest of a state official in vindicating the Constitution of the United States gives him no legal standing here to attack the constitutionality of a state statute in order to avoid compliance with it. . . . Nor can recognition by a state court of such an undifferentiated, general interest confer jurisdiction on us. . . .

We can only adjudicate an issue as to which there is a claimant before us who has a special, individualized stake in it. One who is merely the self-constituted spokesman of a constitutional point of view can not ask us to pass on it. The Kansas legislators could not bring suit explicitly on behalf of the people of the United States to determine whether Kansas could still vote for the Child Labor Amendment. They can not gain standing here by having brought such a suit in their own names. Therefore, none of the petitioners can here raise questions concerning the power of the Kansas legislature to ratify the Amendment.

This disposes of the standing of the three members of the lower house who seek to invoke the jurisdiction of this Court. They have no standing here. Equally without litigious standing is the member of the Kansas Senate who voted for "Senate Concurrent Resolution No. 3." He cannot claim that his vote was denied any parliamentary

efficacy to which it was entitled. There remains for consideration only the claim of the twenty nay-voting senators that the Lieutenant-Governor of Kansas, the presiding officer of its Senate, had, under the Kansas Constitution, no power to break the tie in the senatorial vote on the Amendment, thereby depriving their votes of the effect of creating such a tie. Whether this is the tribunal before which such a question can be raised by these senators must be determined even before considering whether the issue which they pose is justiciable. For the latter involves questions affecting the distribution of constitutional power which should be postponed to preliminary questions of legal standing to sue.

The right of the Kansas senators to be here is rested on recognition by *Leser v. Garnett*, 258 U.S. 130, of a voter's right to protect his franchise. The historic source of this doctrine and the reasons for it were explained in *Nixon v. Herndon*, 273 U.S. 536, 540. That was an action for \$5,000 damages against the Judges of Elections for refusing to permit the plaintiff to vote at a primary election in Texas. In disposing of the objection that the plaintiff had no cause of action because the subject matter of the suit was political, Mr. Justice Holmes thus spoke for the Court: "Of course the petition concerns political action but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years, since *Ashby v. White*, 2 Ld. Raym. 938, 3 id. 320, and has been recognized by this Court." "Private damage" is the clue to the famous ruling in *Ashby v. White*, *supra*, and determines its scope as well as that of cases in this Court of which it is the justification. The judgment of Lord Holt is permeated with the conception that a voter's franchise is a personal right, assessable in money damages, of which the exact amount "is peculiarly appropriate for the determination of a jury," . . . and for which there is no remedy outside the law courts. . . .

The reasoning of *Ashby v. White* and the practice which has followed it leave intra-parliamentary controversies to parliaments and outside the scrutiny of law courts. The procedures for voting in legislative assemblies—who are members, how and when they should vote, what is the requisite number of votes for different phases of legislative activity, what votes were cast and how they were counted—surely are matters that not merely concern political



action but are of the very essence of political action, if "political" has any connotation at all. . . . In no sense are they matters of "private damage." They pertain to legislators not as individuals but as political representatives executing the legislative process. To open the law courts to such controversies is to have courts sit in judgment on the manifold disputes engendered by procedures for voting in legislative assemblies. If the doctrine of *Ashby v. White* vindicating the private rights of a voting citizen has not been doubted for over two hundred years, it is equally significant that for over two hundred years *Ashby v. White* has not been sought to be put to purposes like the present. In seeking redress here these Kansas senators have wholly misconceived the functions of this Court. . . .

## COURTS AND THE CONDUCT OF FOREIGN RELATIONS

### *United States v. Pink*

315 U.S. 203, 234 (1942)

In the Litvinov Assignment of 1933 and as part of the settlement leading to the full recognition of the Soviet Union by the American government, the Soviet government assigned certain claims to the United States. Fulfilling its obligation under this agreement, the United States instituted legal proceedings to recover the assets of the New York branch of the First Russian Insurance Co. This company had been organized under the laws of Czarist Russia.

In 1918 the Soviet government nationalized the business of insurance, including the property of all Russian insurance companies wherever located. The New York branch of the First Russian Insurance Co. continued to do business until 1925, when its assets were taken over by the Superintendent of Insurance pursuant to an order of the New York Supreme Court. After payment of all domestic creditors there remained a balance of more than \$1,000,000, which in 1931 the Superintendent of Insurance was directed by the New York Court of Appeals to liquidate by paying the claims of the foreign creditors and turning over what remained to the Board of Directors of the company.

Whether the United States, by virtue of the Litvinov Assignment, could take possession of these funds, notwithstanding the disposition ordered by the New York courts, was the knotty problem the Supreme

Court was called upon to determine. In an opinion by Mr. Justice Douglas, the Court held that as a result of the nationalization decrees, the assets of the First Russian Insurance Co. passed to the Russian government and later to the United States under the Litvinov Assignment. The United States was therefore entitled to the property as against the corporation and its foreign creditors. The power of the President to recognize foreign governments includes the power to arrange for the settlement of claims, so that acceptance of the Litvinov Assignment by President Roosevelt was binding on the courts. Mr. Justice Douglas stressed the point that enforcement of the mandate of the New York Court of Appeals would conflict with federal policy in a field belonging exclusively to the national government.

Joined by Mr. Justice Roberts, Chief Justice Stone dissented, insisting that the states are free to apply their own rules to property located within their territorial limits, unless to do so would conflict with treaty provisions. "This Court has repeatedly decided," he wrote, "that the extent to which a state court will follow the rules of law of a recognized foreign country in preference to its own is wholly a matter of comity, and that, in the absence of relevant treaty obligations, the application in the courts of a state of its own rules of law rather than those of a foreign country raises no federal question."

In a separate concurring opinion, Mr. Justice Frankfurter reviewed the course of the litigation in the courts of England and New York arising out of Russia's nationalization decrees, and went on to argue that the consequent confusion demonstrated the "mischief" which results when courts intrude into the domain of external affairs:

. . . . .

Legal ideas, like other organisms, cannot survive severance from their congenial environment. Concepts like "situs" and "jurisdiction" and "comity" summarize views evolved by the judicial process, in the absence of controlling legislation, for the settlement of domestic issues. To utilize such concepts for the solution of controversies international in nature, even though they are presented to the courts in the form of a private litigation, is to invoke a narrow and inadmissible frame of reference.

The expropriation decrees of the U.S.S.R. gave rise to extensive litigation among various classes of claimants to funds belonging to Russian companies doing business or keeping accounts abroad. England and New York were the most active centers of this litigation. The opinions in the many cases before their courts constitute

a sizable library. They all derive from a single theme—the effect of the Russian expropriation decrees upon particular claims, in some cases before and in some cases after recognition of the U.S.S.R., either *de jure* or *de facto*. One cannot read this body of judicial opinions, in the Divisional Court, the Court of Appeal and the House of Lords, in the New York Supreme Court, the Appellate Division, and the Court of Appeals, and not be left with the conviction that they are the product largely of casuistry, confusion, and indecision. See Jaffe, *Judicial Aspects of Foreign Relations*, *passim*. The difficulties were inherent in the problems that confronted the courts. They were due to what Chief Judge Cardozo called “the hazards and embarrassments growing out of the confiscatory decrees of the Russian Soviet Republic,” . . . and to the endeavor to adjust these “hazards and embarrassments” to “the largest considerations of public policy and justice,” . . . when private claims to funds covered by the expropriation decrees were before the courts, particularly at a time when non-recognition was our national policy.

The opinions show both the English and the New York courts struggling to deal with these business consequences of major international complications through the application of traditional judicial concepts. “Situs,” “jurisdiction,” “comity,” “domestication” and “dissolution” of corporations, and other legal ideas that often enough in litigation of a purely domestic nature prove their limitations as instruments for solution or even as means for analysis, were pressed into service for adjudicating claims whose international implications could not be sterilized. . . .

Courts could hardly escape perplexities when citizens asserted claims to Russian funds within the control of the forum. But a totally different situation was presented when all claims of local creditors were satisfied and only the conflicting claims of Russia and of former Russian creditors were involved. In the particular circumstances of Russian insurance companies doing business in New York, the State Superintendent of Insurance took possession of the assets of the Russian branches in New York to conserve them for the benefit of those entitled to them. Liquidation followed, domestic creditors and policy holders were paid, and the Superintendent found a large surplus on his hands. As statutory liquidator, the Superintendent of Insurance took the ground that “in view of the hazards and uncertainties of the Russian situation, the surplus

should not be paid to any one, but should be left in his hands indefinitely, until a government recognized by the United States shall function in the territory of what was once the Russian Empire." . . . So the Appellate Division decreed. . . . But the Court of Appeals reversed and the scramble among the foreign claimants was allowed to proceed. . . . The Court of Appeals held that the retention of the surplus funds in the custody of the Superintendent of Insurance until the international relations between the United States and Russia had been formalized "did not solve the problem. It adjourned it sine die." But adjournment, it may be suggested, is sometimes a constructive interim solution to avoid a temporizing and premature measure giving rise to new difficulties. Such I believe to have been the mischief that was bound to follow the rejection of the Superintendent's policy of conservation of the surplus Russian funds until recognition. Their disposition was inescapably entangled in recognition.

In the immediate case the United States sues, in effect, as the assignee of the Russian government for claims by that government against the Russian Insurance Company for monies in deposit in New York to which no American citizen makes claim. No manner of speech can change the central fact that here are monies which belonged to a Russian company and for which the Russian government has decreed payment to itself.

And so the question is whether New York can bar Russia from realizing on its decrees against these funds in New York after formal recognition by the United States of Russia and in light of the circumstances that led up to recognition and the exchange of notes that attended it. For New York to deny the effectiveness of these Russian decrees under such circumstances would be to oppose, at least in some respects, its notions as to the effect which should be accorded recognition as against that entertained by the national authority for conducting our foreign affairs. And the result is the same whether New York accomplishes it because its courts invoke judicial views regarding the enforcement of foreign expropriation decrees, or regarding the survival in New York of a Russian business which according to Russian law had ceased to exist, or regarding the power of New York courts over funds of Russian companies owing from New York creditors. If this Court is not bound by the construction which the New York Court of Appeals

places upon complicated transactions in New York in determining whether they come within the protection of the Constitution against impairing the obligations of contract, we certainly should not be bound by that court's construction of transactions so entangled in international significance as the status of New York branches of Russian companies and the disposition of their assets. . . . When the decision of a question of fact or of local law is so interwoven with the decision of a question of national authority that the one necessarily involves the other, we are not foreclosed by the state court's determination of the facts or of the local law. Otherwise, national authority could be frustrated by local rulings. . . .

It is not consonant with the sturdy conduct of our foreign relations that the effect of Russian decrees upon Russian funds in this country should depend on such gossamer distinctions as those by which courts have determined that Russian branches survive the death of their Russian origin. When courts deal with such essentially political phenomena as the taking over of Russian businesses by the Russian government by resorting to the forms and phrases of conventional corporation law, they inevitably fall into a dialectic quagmire. . . .

. . . . .

As between the states, due regard for their respective governmental acts is written into the Constitution by the Full Faith and Credit Clause (Art. IV, §1). But the scope of its operation—when may the policy of one state deny the consequence of a transaction authorized by the laws of another—has given rise to a long history of judicial subtleties which hardly commend themselves for transfer to the solution of analogous problems between friendly nations. . . .

For more than fifteen years, formal relations between the United States and Russia were broken because of serious differences between the two countries regarding the consequences to us of two major Russian policies. This complicated process of friction, abstention from friendly relations, efforts at accommodation, and negotiations for removing the causes of friction, are summarized by the delusively simple concept of "non-recognition." The history of Russo-American relations leaves no room for doubt that the two underlying sources of difficulty were Russian propaganda and expropriation. Had any state court during this period given comfort to

the Russian views in this contest between its government and ours, it would, to that extent, have interfered with the conduct of our foreign relations by the Executive, even if it had purported to do so under the guise of enforcing state law in a matter of local policy. On the contrary, during this period of non-recognition New York denied Russia access to her courts and did so on the single and conclusive ground: "We should do nothing to thwart the policy which the United States has adopted." . . . Similarly, no invocation of a local rule governing "situs" or the survival of a domesticated corporation, however applicable in an ordinary case, is within the competence of a state court if it would thwart to any extent "the policy which the United States has adopted" when the President reestablished friendly relations in 1933.

And it would be thwarted if the judgment below were allowed to stand.

That the President's control of foreign relations includes the settlement of claims is indisputable. Thus, referring to the adhesion of the United States to the Dawes Plan, Secretary of State Hughes reported that "this agreement was negotiated under the long-recognized authority of the President to arrange for the payment of claims in favor of the United States and its nationals. The exercise of this authority has many illustrations, one of which is the Agreement of 1901 for the so-called Boxer Indemnity." . . . The President's power to negotiate such a settlement is the same whether it is an isolated transaction between this country and a friendly nation, or is part of a complicated negotiation to restore normal relations, as was the case with Russia.

That the power to establish such normal relations with a foreign country belongs to the President is equally indisputable. Recognition of a foreign country is not a theoretical problem or an exercise in abstract symbolism. It is the assertion of national power directed towards safeguarding and promoting our interests and those of civilization. Recognition of a revolutionary government normally involves the removal of areas of friction. As often as not, areas of friction are removed by the adjustment of claims pressed by this country on behalf of its nationals against a new régime.

Such a settlement was made by the President when this country resumed normal relations with Russia. The two chief barriers to renewed friendship with Russia—intrusive propaganda and the effects of expropriation decrees upon our nationals—were at the core

of our negotiations in 1933, as they had been for a good many years. The exchanges between the President and M. Litvinov must be read not in isolation but as the culmination of difficulties and dealings extending over fifteen years. And they must be read not as self-contained technical documents, like a marine insurance contract or a bill of lading, but as characteristically delicate and elusive expressions of diplomacy. The draftsmen of such notes must save sensibilities and avoid the explicitness on which diplomatic negotiations so easily founder.

The controlling history of the Soviet régime and of this country's relations with it must be read between the lines of the Roosevelt-Litvinov Agreement. One needs to be no expert in Russian law to know that the expropriation decrees intended to sweep the assets of Russian companies taken over by that government into Russia's control no matter where those assets were credited. Equally clear is it that the assignment by Russia meant to give the United States, as part of the comprehensive settlement, everything that Russia claimed under its laws against Russians. It does violence to the course of negotiations between the United States and Russia, and to the scope of the final adjustment, to assume that a settlement thus made on behalf of the United States—to settle both money claims and to soothe feelings—was to be qualified by the variant notions of the courts of the forty-eight states regarding "situs" or "jurisdiction" over intangibles or the survival of extinct Russian corporations. In our dealings with the outside world, the United States speaks with one voice and acts as one, unembarrassed by the complications as to domestic issues which are inherent in the distribution of political power between the national government and the individual states.

### THE JUDICIARY AND "THE POLITICS OF THE PEOPLE"

*Colegrove v. Green*

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328 U.S. 549 (1946)

This case deals with the interesting and important question whether a state can be compelled to revise its congressional districts in keeping with shifts in the distribution of population as indicated by the latest census. It was brought by three Illinois voters who sought to restrain

the governor and other state officials from conducting the November, 1946, elections on the basis of a 1901 law governing congressional districts. They themselves were living in districts ranging in population from 612,000 to 914,000. Twenty other congressional districts in Illinois have populations that range from 112,000 to 285,000. The Illinois legislature established these districts in 1901 on the basis of the 1900 census. Although every federal census since then had disclosed an increase in the population of Illinois and corresponding shifts in the distribution of the population among congressional districts, the state legislature has failed to correct the discrepancies.

The voters complained that because of these changes in population the congressional districts created by the 1901 law lacked compactness of territory and approximate equality of population. They asked a Federal District Court to set aside the state law as in conflict with several provisions of the Constitution of the United States and also the Congressional Reapportionment Act of 1911 as amended. One of their chief objections was that since they live in the heavily populated districts their vote is much less effective than the vote of those residing in the districts with the smaller population. The District Court dismissed the complaint and was sustained by the Supreme Court.

Of the seven sitting Justices, four voted to uphold the District Court and three dissented. (Chief Justice Stone had died after the case had been argued but before it was decided, and Mr. Justice Jackson was still on leave.) Mr. Justice Frankfurter announced the judgment of the Court in an opinion in which only Justices Reed and Burton concurred. While Mr. Justice Rutledge joined in affirming the lower court's action, he thought that the better course would have been to dismiss the suit for want of jurisdiction. In the view of those for whom Mr. Justice Frankfurter was speaking, the three Illinois voters were asking the Court for something which was "beyond its competence to grant," and the Court was powerless to act because the issue was of a "peculiarly political nature and therefore not meet for judicial determination."

For himself and Justices Douglas and Murphy, Mr. Justice Black wrote a detailed dissent, strongly denying that deciding the controversy on its merits would involve the Court in political questions. The Court was not being asked to supervise elections but merely to annul a state apportionment law and to enjoin its enforcement. Mr. Justice Black agreed with the complaining voters that they as well as the other voters of the heavily populated districts were the victims of discrimination amounting to a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment. The failure to reapportion led to a situation where the vote of some voters was one-ninth as effective as that



of others. Moreover, by reducing their voting power the state law is abridging their privilege as citizens to vote for Congressmen and violates Article I of the Constitution: "While the Constitution contains no express provision requiring that congressional election districts established by the states must contain approximately equal populations, the constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be designed to give approximately equal weight to each vote cast."

Mr. Justice Frankfurter's opinion read in part as follows:

. . . . .

The District Court was clearly right in deeming itself bound by *Wood v. Broom* [287 U.S. 1] and we could also dispose of this case on the authority of *Wood v. Broom*. The legal merits of this controversy were settled in that case, inasmuch as it held that the Reapportionment Act of June 18, 1929, . . . as amended, . . . has no requirements "as to the compactness, contiguity and equality in population of districts." . . . The Act of 1929 still governs the districting for the election of Representatives. . . . Nothing has now been adduced to lead us to overrule what this Court found to be the requirements under the Act of 1929, the more so since seven Congressional elections have been held under the Act of 1929 as construed by this Court. No manifestation has been shown by Congress even to question the correctness of that which seemed compelling to this Court in enforcing the will of Congress in *Wood v. Broom*.

. . . . .

We are of opinion that the appellants ask of this Court what is beyond its competence to grant. This is one of those demands on judicial power which cannot be met by verbal fencing about "jurisdiction." It must be resolved by considerations on the basis of which this Court, from time to time, has refused to intervene in controversies. It has refused to do so because due regard for the effective working of our government revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination.

This is not an action to recover for damage because of the discriminatory exclusion of a plaintiff from rights enjoyed by other citizens. The basis for the suit is not a private wrong, but a wrong

suffered by Illinois as a polity. . . . In effect this is an appeal to the federal courts to reconstruct the electoral process of Illinois in order that it may be adequately represented in the councils of the Nation. Because the Illinois legislature has failed to revise its Congressional Representative districts in order to reflect great changes, during more than a generation, in the distribution of its population, we are asked to do this, as it were, for Illinois.

Of course no court can affirmatively re-map the Illinois districts so as to bring them more in conformity with the standards of fairness for a representative system. At best we could only declare the existing electoral system invalid. The result would be to leave Illinois undistricted and to bring into operation, if the Illinois legislature chose not to act, the choice of members for the House of Representatives on a state-wide ticket. The last stage may be worse than the first. The upshot of judicial action may defeat the vital political principle which led Congress, more than a hundred years ago, to require districting. This requirement, in the language of Chancellor Kent, "was recommended by the wisdom and justice of giving, as far as possible, to the local subdivisions of the people of each state, a due influence in the choice of representatives, so as not to leave the aggregate minority of the people in a state, though approaching perhaps to a majority, to be wholly overpowered by the combined action of the numerical majority, without any voice whatever in the national councils." . . . Assuming acquiescence on the part of the authorities of Illinois in the selection of its Representatives by a mode that defies the direction of Congress for selection by districts, the House of Representatives may not acquiesce. In the exercise of its power to judge the qualifications of its own members, the House may reject a delegation of Representatives-at-large. . . . Nothing is clearer than that this controversy concerns matters that bring courts into immediate and active relations with party contests. From the determination of such issues this Court has traditionally held aloof. It is hostile to a democratic system to involve the judiciary in the politics of the people. And it is not less pernicious if such judicial intervention in an essentially political contest be dressed up in the abstract phrases of the law.

The appellants urge with great zeal that the conditions of which they complain are grave evils and offend public morality. The Constitution of the United States gives ample power to provide against

these evils. But due regard for the Constitution as a viable system precludes judicial correction. Authority for dealing with such problems resides elsewhere. Article I, §4, of the Constitution provides that "The Times, Places and Manner of holding Elections for . . . Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such regulations, . . ." The short of it is that the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House and left to that House determination whether States have fulfilled their responsibility. If Congress failed in exercising its powers, whereby standards of fairness are offended, the remedy ultimately lies with the people. Whether Congress faithfully discharges its duty or not, the subject has been committed to the exclusive control of Congress. An aspect of government from which the judiciary, in view of what is involved, has been excluded by the clear intention of the Constitution cannot be entered by the federal courts because Congress may have been in default in exacting from States obedience to its mandate.

The one stark fact that emerges from a study of the history of Congressional apportionment is its embroilment in politics, in the sense of party contests and party interests. The Constitution enjoins upon Congress the duty of apportioning Representatives "among the several States . . . according to their respective Numbers, . . ." Article I, §2. Yet, Congress has at times been heedless of this command and not apportioned according to the requirements of the Census. It never occurred to anyone that this Court could issue mandamus to compel Congress to perform its mandatory duty to apportion. . . . Until 1842 there was the greatest diversity among the States in the manner of choosing Representatives because Congress had made no requirement for districting. . . . Congress then provided for the election of Representatives by district. Strangely enough, the power to do so was seriously questioned; it was still doubted by a Committee of Congress as late as 1901. . . . In 1850 Congress dropped the requirement. . . . The Reapportionment Act of 1862 required that the districts be of contiguous territory. . . . In 1872 Congress added the requirement of substantial equality of inhabitants. . . . This was reinforced in 1911. . . . But the 1929 Act, as we have seen, dropped these requirements. . . . Throughout our history, whatever may have been the controlling Apportion-

ment Act, the most glaring disparities have prevailed as to the contours and the population of districts. . . .

To sustain this action would cut very deep into the very being of Congress. Courts ought not to enter this political thicket. The remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress. The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action. Thus, "on Demand of the executive Authority," Art. IV, §2, of a State it is the duty of a sister State to deliver up a fugitive from justice. But the fulfilment of this duty cannot be judicially enforced. *Kentucky v. Dennison*, 24 How. 66. The duty to see to it that the laws are faithfully executed cannot be brought under legal compulsion, *Mississippi v. Johnson*, 4 Wall. 475. Violation of the great guaranty of a republican form of government in States cannot be challenged in the courts. *Pacific Telephone Co. v. Oregon*, 223 U.S. 118. The Constitution has left the performance of many duties in our governmental scheme to depend on the fidelity of the executive and legislative action and, ultimately, on the vigilance of the people in exercising their political rights.

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## GOVERNMENT AND ECONOMIC INTERESTS

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### "QUESTIONS OF POLICY NOT FOR US TO JUDGE"

*Osborn v. Ozlin*

310 U.S. 53 (1940)

By the time Mr. Justice Frankfurter joined the Court, it had largely abandoned those principles of interpretation which had limited the power of legislatures to regulate business enterprise. To him nevertheless fell the task of expressing the new judicial attitude in several important cases. One of these is the case from which the opinion printed below is taken.

It sustained the constitutionality of a Virginia statute forbidding contracts of insurance by companies authorized to do business within the state except through resident agents. Rejecting the claim that the legislation denied due process of law by interfering with freedom of action outside Virginia, Justice Frankfurter took occasion to remark that the Court was not concerned with the wisdom of the economic policy it embodied: "It is . . . immaterial that . . . state action may run counter to the economic wisdom either of Adam Smith or of J. Maynard Keynes, or may be ultimately mischievous even from the point of view of avowed state policy." Dissenting were Chief Justice Hughes and Justices Roberts and McReynolds, for whom Justice Roberts complained that Virginia was seeking to control "transactions beyond her jurisdiction."

Mr. Justice Frankfurter's opinion for the Court read in part:

Appellants have challenged the validity of a Virginia statute regulating the insurance of Virginia risks and have brought this suit

to enjoin state officers from enforcing it. Its relevant provisions, . . . forbid contracts of insurance or surety by companies authorized to do business within that Commonwealth "except through regularly constituted and registered resident agents or agencies of such companies." . . . Such resident agents "shall be entitled to and shall receive the usual and customary commissions allowed on such contracts," and may not share more than half of this commission with a non-resident broker. . . . Disobedience of these provisions (from which life, title and marine companies are exempted) may entail a fine or revocation of the corporate license in Virginia, or both. . . .

The bill was brought by foreign corporations authorized to do casualty and surety business in Virginia, and by some of their salaried employees. It is their claim that the statute deprives them of rights protected by the Fourteenth Amendment of the Constitution. . . .

The "production" of insurance—"production" being insurance jargon for obtaining business—is, in the main, carried on by two groups, agents and brokers. Though both are paid by commission, the different ways in which the two groups perform their functions have important practical consequences in the conduct of the insurance business, and hence in its regulation. The agent is tied to his company. But his ability to "produce" business depends upon the confidence of the community in him. He must therefore cultivate the good will and sense of dependence of his clients. He may finance the payment of premiums; he frequently assists in the filing and prosecution of claims; he acts as mediator between insurer and assured in the diverse situations which arise. The broker, on the other hand, is an independent middleman, not tied to a particular company. He meets more specially the needs of large customers, using their concentrated bargaining power to obtain the most favorable terms from competing companies. His activities, being largely confined to the big commercial centers, take place mostly outside Virginia.

A policy, whether "produced" by broker or agent, must be "serviced"—an insurance term for assistance rendered a customer in minimizing his risks. To this end the companies exert themselves directly, but the "producer" may render additional service. Only to a limited extent can risks be minimized at long range; local activity is essential. When the contract is "produced" by a non-resident

broker the "servicing" function is normally performed by the company exclusively. When the "producer" is a resident agent, the case is ordinarily otherwise. For this, as well as for other reasons, it is obvious that non-resident brokers prefer to negotiate their contracts covering Virginia risks with companies authorized to do business in that Commonwealth.

These basic elements in the insurance business attain special significance in the case of enterprises operating not only in Virginia but in other states as well. For them the brokerage system offers the attractions of large-scale production. Through what is known as a master or "hotchpotch" policy, the assured may obtain a cheaper rate by pooling all his risks, whether in or out of Virginia. This wholesale insurance may furnish not only a reduced rate but a reduced commission to the customer. These are advantages which naturally draw the Virginia business of interstate enterprises away from local agents in Virginia to the great insurance centers.

In affecting the cost of these master policies, say the appellants, Virginia is intruding upon business transactions beyond its borders. Not only is a licensed company forbidden to write insurance except through a resident agent, but the agent cannot retain less than one-half of the customary commission allowed on such a contract for what may, so far as the requirements of the law are concerned, be no more than the perfunctory service of countersigning the policy.

But the question is not whether what Virginia has done will restrict appellants' freedom of action outside Virginia by subjecting the exercise of such freedom to financial burdens. The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids. . . . It is equally immaterial that such state action may run counter to the economic wisdom either of Adam Smith or of J. Maynard Keynes, or may be ultimately mischievous even from the point of view of avowed state policy. Our inquiry must be much narrower. It is whether Virginia has taken hold of a matter within her power, or has reached beyond her borders to regulate a subject which was none of her concern because the Constitution has placed control elsewhere. . . .

Virginia has not sought to prohibit the making of contracts beyond her borders. She merely claims that her interest in the risks which these contracts are designed to prevent warrants the kind of

control she has here imposed. This legislation is not to be judged by abstracting an isolated contract written in New York from the organic whole of the insurance business, the effect of that business on Virginia, and Virginia's regulation of it.

A network of legislation controls the surety and casualty business in Virginia. Insolvent companies may not engage in it. . . . Neither companies nor agents may give rebates. . . . Rates for workmen's compensation, automobile liability and surety contracts are determined by its Corporation Commission. . . . The difficulty of enforcing these regulations, so the District Court found, may be increased if policies covering Virginia risks are "produced" without participation by responsible local agents. Rebates evading local restriction may be granted under cover of business done outside the state. Contrariwise, if resident Virginia agents are made necessary conduits for insurance on Virginia risks now included in master policies, the state may have better means of acquiring accurate information for the effectuation of measures which it deems protective of its interests. (\*)

It is claimed that the requirement that not less than one-half of the customary commission be retained by the resident agent is a bald exaction for what may be no more than the perfunctory service of countersigning policies. The short answer to this is that the state may rely on this exaction as a mode of assuring the active use of resident agents for procuring and "servicing" policies covering Virginia risks. These functions, when adequately performed, benefit not only the company, the producer, and the assured. By minimizing the risks of casualty and loss, they redound in a pervasive way to the benefit of the community. (\*) At least Virginia may so have believed. And she may also have concluded that an agency system, such as this legislation was designed to promote, is better calculated to further these desirable ends than other modes of "production." (\*) When these beliefs are emphasized by legislation embodying similar notions of policy in a dozen states, (\*) it would savor of intolerance for us to suggest that a legislature could not constitutionally entertain the views which the legislation adopts. . . .

The present case, therefore, is wholly unlike those instances in which a "so-called right is used as part of a scheme to accomplish a forbidden result." . . . For it is clear that Virginia has a definable interest in the contracts she seeks to regulate and that what she



has done is very different from the imposition of conditions upon appellants' privilege of engaging in local business which would bring within the orbit of state power matters unrelated to any local interests. It is not our province to measure the social advantage to Virginia of regulating the conduct of insurance companies within her borders in so far as it affects Virginia risks. Government has always had a special relation to insurance. The ways of safeguarding against the untoward manifestations of nature and other vicissitudes of life have long been withdrawn from the benefits and caprices of free competition. The state may fix insurance rates, . . . it may regulate the compensation of agents, . . . it may curtail drastically the area of free contract, . . . States have controlled the expenses of insurance companies. . . . They have also promoted insurance through savings banks. . . . In the light of all these exertions of state power it does not seem possible to doubt that the state could, if it chose, go into the insurance business, just as it can operate warehouses, flour mills, and other business ventures, . . . or might take "the whole business of banking under its control." . . . If the state, as to local risks, could thus preempt the field of insurance for itself, it may stay its intervention short of such a drastic step by insisting that its own residents shall have a share in devising and safeguarding protection against its local hazards. . . . All these are questions of policy not for us to judge. For it can never be emphasized too much that one's own opinion as to the wisdom of a law must be wholly excluded when one is doing one's judicial duty. The limit of our inquiry is reached when we conclude that Virginia has exerted its powers as to matters within the bounds of her control.

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#### AGRICULTURE "IN OUR NATIONAL ECONOMY"

*Tigner v. Texas*

310 U.S. 141 (1940)

At the beginning of the present century, the Supreme Court (with one judge dissenting) struck down an Illinois statute of 1893 which exempted agriculture from the operation of the state's anti-trust laws. This was the

case of *Connolly v. Union Sewer Pipe Co.*, 184 U.S. 540. In the *Tigner* case, the Court had before it virtually identical legislation adopted by Texas whose validity was being drawn into question on the basis of the decision in the *Connolly* case. "Connolly's case has been worn away by the erosion of time, and we are of opinion that it is no longer controlling," Justice Frankfurter tersely announced for the Court in an opinion which only Justice McReynolds would not support:

The problem, in brief, is this: May Texas promote its policy of freedom for economic enterprise by utilizing the criminal law against various forms of combination and monopoly, but exclude from criminal punishment corresponding activities of agriculture?

Legislation, both state and federal, similar to that of Texas had its origin in fear of the concentration of industrial power following the Civil War. Law was invoked to buttress the traditional system of free competition, free markets and free enterprise. Pressure for this legislation came more particularly from those who as producers, as well as consumers, constituted the most dispersed economic groups.(\*). These large sections of the population—those who labored with their hands and those who worked the soil—were as a matter of economic fact in a different relation to the community from that occupied by industrial combinations. Farmers were widely scattered and inured to habits of individualism; their economic fate was in large measure dependent upon contingencies beyond their control. In these circumstances, legislators may well have thought combinations of farmers and stockmen presented no threat to the community, or, at least, the threat was of a different order from that arising through combinations of industrialists and middlemen. At all events legislation like that of Texas rested on this view, curbing industrial and commercial combinations, and did not visit the same condemnation upon collaborative efforts by farmers and stockmen because the latter were felt to have a different economic significance.(\*).

Since *Connolly's* case was decided, nearly forty years ago, an impressive legislative movement bears witness to general acceptance of the view that the differences between agriculture and industry call for differentiation in the formulation of public policy. The states as well as the United States have sanctioned cooperative action by farmers; have restricted their amenability to the anti-trust laws; have relieved their organizations from taxation. . . . Congress and the states have sometimes thought it necessary to control the

supply and price of agricultural commodities within their respective spheres of jurisdiction, and the constitutional validity of these measures has been sustained. . . .

At the core of all these enactments lies a conception of price and production policy for agriculture very different from that which underlies the demands made upon industry and commerce by anti-trust laws. (\*) These various measures are manifestations of the fact that in our national economy agriculture expresses functions and forces different from the other elements in the total economic process. Certainly these are differences which may be acted upon by the lawmakers. The equality at which the "equal protection" clause aims is not a disembodied equality. The Fourteenth Amendment enjoins "the equal protection of the laws," and laws are not abstract propositions. They do not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. And so we conclude that to write into law the differences between agriculture and other economic pursuits was within the power of the Texas legislature. Connolly's case has been worn away by the erosion of time, and we are of opinion that it is no longer controlling.

Another feature of Texas anti-trust legislation is relied on by Tigner to invalidate the criminal statute under which he is being prosecuted. Beginning with the first enactment in 1894, the Texas anti-trust laws have had a complicated and checkered history. At present there are two statutes directed at combination and monopoly—the one under which Tigner was indicted, and another, subjecting to civil penalties the same conduct at which the challenged criminal law is aimed. . . . From such civil proceedings, which the Attorney General initiates, no exemption is given to farmers and stockmen. Appellant urges that the divergence between civil and criminal laws relating to the same conduct undermines the validity of the exemption in the criminal statute and thus invalidates the whole of it. This argument is but a minor variation on appellant's main theme. It amounts to a claim that differences substantial enough to permit substantive differentiation in formulating legislative policy do not permit differentiation as to remedy.

How to effectuate policy—the adaptation of means to legitimately

sought ends—is one of the most intractable of legislative problems. Whether proscribed conduct is to be deterred by *qui tam* action or triple damages or injunction, or by criminal prosecution, or merely by defense to actions in contract, or by some, or all, of these remedies in combination, is a matter within the legislature's range of choice. Judgment on the deterrent effect of the various weapons in the armory of the law can lay little claim to scientific basis. Such judgment as yet is largely a prophecy based on meager and uninterpreted experience. How empiric the process is of adjusting remedy to policy, is shown by the history of anti-trust laws in Texas and elsewhere. The Sherman Law originally employed the injunction at the suit of the government, private action for triple damages, criminal prosecution and forfeiture. Later the injunction was made available to private suitors. (\*) . . .

Legislation concerning economic combinations presents peculiar difficulties in the fashioning of remedies. The sensitiveness of the economic mechanism, the risks of introducing new evils in trying to stamp out old, familiar ones, the difficulties of proof within the conventional modes of procedure, the effect of shifting tides of public opinion—these and many other subtle factors must influence legislative choice. Moreover, the whole problem of deterrence is related to still wider considerations affecting the temper of the community in which law operates. The traditions of a society, the habits of obedience to law, the effectiveness of the law-enforcing agencies, are all peculiarly matters of time and place. They are thus matters within legislative competence. To say that the legislature of Texas must give to farmers complete immunity or none at all, is to say that judgment on these vexing issues precludes the view that, while the dangers from combinations of farmers and stockmen are so tenuous that civil remedies suffice to secure deterrence, they are substantial enough not to warrant entire disregard. We hold otherwise. Here, again, we must be mindful not of abstract equivalents of conduct, but of conduct in the context of actuality. Differences that permit substantive differentiations also permit differentiations of remedy. We find no constitutional bar against excluding farmers and stockmen from the criminal statute against combination and monopoly, and so holding, we conclude that there was likewise no bar against making the exemption partial rather than complete.

THE PUBLIC INTEREST AND "THE CONSTITUTIONAL  
RESTRICTIONS OF THE CONTRACT CLAUSE"*East New York Savings Bank v. Hahn*

326 U.S. 230 (1945)

Along with other states, New York was forced by depression conditions to adopt legislation suspending the right to foreclose mortgages. The original Mortgage Moratorium Law was passed in 1933 and was renewed from time to time. When it was again extended in 1943, it was resisted with the argument that since the emergency had passed the legislature was violating the provision of the Federal Constitution which forbids the states to pass any "law impairing the obligations of contracts" as well as the due process clause of the Fourteenth Amendment.

Mr. Justice Frankfurter presented the Court's unanimous opinion holding the 1943 renewal to be valid, relying in the main on the opinion which Chief Justice Hughes had written eleven years earlier for a bare majority of five sustaining the constitutionality of Minnesota's Mortgage Moratorium Law of 1933. *Home Building and Loan Association v. Blaisdell*, 290 U.S. 398.

Mr. Justice Frankfurter wrote:

This was an action begun in 1944 to foreclose a mortgage on real property in the City of New York for non-payment of principal that had become due in 1924. The trial court held that the foreclosure proceeding was barred by the applicable New York Moratorium Law. . . . This Law, Chapter 93 of the Laws of New York of 1943, extended for another year legislation first enacted in 1933, whereby the right of foreclosure for default in the payment of principal was suspended for a year as to mortgages executed prior to July 1, 1932. (\*) Year by year (except in 1941 when an extension for two years was made), the 1933 statute was renewed for another year. The New York Court of Appeals, one judge dissenting, affirmed the trial court's judgment. . . .

Since *Home Bldg. & L. Assn. v. Blaisdell*, 290 U.S. 398, there are left hardly any open spaces of controversy concerning the constitutional restrictions of the Contract Clause upon moratory legislation referable to the depression. The comprehensive opinion of Mr. Chief Justice Hughes in that case cut beneath the skin of words to

the core of meaning. After a full review of the whole course of decisions expounding the Contract Clause—covering almost the life of this Court—the Chief Justice, drawing on the early insight of Mr. Justice Johnson (\*) in *Ogden v. Saunders*, 12 Wheat. 213, 286, as reinforced by later decisions cast in more modern terms, . . . put the Clause in its proper perspective in our constitutional framework. The *Blaisdell* case and decisions rendered since . . . , yield this governing constitutional principle: when a widely diffused public interest has become enmeshed in a network of multitudinous private arrangements, the authority of the State “to safeguard the vital interests of its people” . . . is not to be gainsaid by abstracting one such arrangement from its public context and treating it as though it were an isolated private contract constitutionally immune from impairment.

The formal mode of reasoning by means of which this “protective power of the State” . . . is acknowledged is of little moment. It may be treated as an implied condition of every contract and, as such, as much part of the contract as though it were written into it, whereby the State’s exercise of its power enforces, and does not impair, a contract. A more candid statement is to recognize, as was said in *Manigault v. Springs*, . . . that the power “which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the . . . general welfare of the people, and is paramount to any rights under contracts between individuals.” 199 U.S. at 480. Once we are in this domain of the reserve power of a State we must respect the “wide discretion on the part of the legislature in determining what is and what is not necessary.” *Ibid.* So far as the constitutional issue is concerned, “the power of the State when otherwise justified,” *Marcus Brown Co. v. Feldman*, 256 U.S. 170, 198, is not diminished because a private contract may be affected.

Applying these considerations to the immediate situation brings us to a quick conclusion. In 1933, New York began a series of moratory enactments to counteract the virulent effects of the depression upon New York realty which have been spread too often upon the records of this Court to require even a summary. Chapter 793 of the Laws of 1933 gave a year’s grace against foreclosures of mortgages, but it obligated the mortgagor to pay taxes, insurance, and interest. . . . The moratorium has been extended from year to

year. When the 1937 reenactment was questioned, the New York Court of Appeals again upheld the legislation. . . . This decision was rendered after a joint legislative committee had made a thorough study and recommended continuance of the moratorium. . . . In 1941, the Legislature reflected some changes in economic conditions by requiring amortization of the principal at the rate of 1% per annum, beginning with July 1, 1942. The same legislature established another joint legislative committee to review once more the New York mortgage situation. "After a most exhaustive study of the moratorium," a report was submitted recommending its extension for another year. . . . The Governor of New York urged such legislation . . . and the Law now under attack was enacted. It is relevant to note that the New York Legislature in subsequent extensions of the moratorium again took note of changed economic conditions by increasing the amortization rate to 2% in 1944 . . . and to 3% in 1945. . . .

Appellant asks us to reject the judgment of the joint legislative committee, of the Governor, and of the Legislature, that the public welfare, in the circumstances of New York conditions, requires the suspension of mortgage foreclosures for another year. On the basis of expert opinion, documentary evidence, and economic arguments of which we are to take judicial notice, it urges such a change in economic and financial affairs in New York as to deprive of all justification the determination of New York's Legislature of what New York's welfare requires. We are invited to assess not only the range and incidence of what are claimed to be determining economic conditions in so far as they affect the mortgage market—bank deposits and war savings bonds; increased payrolls and store sales; available mortgage money and rise in real estate values—but also to resolve controversy as to the causes and continuity of such improvements, namely the effect of the war and of its termination, and similar matters. Merely to enumerate the elements that have to be considered shows that the place for determining their weight and their significance is the legislature not the judiciary. Unlike *Worthen Co. v. Kavanaugh*, 295 U.S. 56, 60, here there was no "studied indifference to the interests of the mortgagee or to his appropriate protection." Here the Legislature was not even acting merely upon the pooled general knowledge of its members. The whole course of the New York moratorium legislation shows the empiric process of

legislation at its fairest: frequent reconsideration, intensive study of the consequences of what has been done, readjustment to changing conditions, and safeguarding the future on the basis of responsible forecasts. The New York Legislature was advised by those having special responsibility to inform it that "the sudden termination of the legislation which has dammed up normal liquidation of these mortgages for more than eight years might well result in an emergency more acute than that which the original legislation was intended to alleviate." . . . It would indeed be strange if there were anything in the Constitution of the United States which denied the State the power to safeguard its people against such dangers. There is nothing. Justification for the 1943 enactment is not negatived because the factors that induced and constitutionally supported its enactment were different from those which induced and supported the moratorium statute of 1933.

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## LABOR AND THE SHERMAN ACT

### *United States v. Hutcheson*

312 U.S. 219 (1941)

Now that the Supreme Court takes a much more tolerant view of legislative power to deal with economic affairs, many a case involving the construction of a statute exceeds in importance decisions interpreting provisions of the Constitution. Such a case is *United States v. Hutcheson*, which arose with an indictment charging that a restraint of trade had been imposed as a result of a jurisdictional dispute between two national unions, the United Brotherhood of Carpenters and Joiners of America and the International Association of Machinists, both affiliated with the American Federation of Labor. When Anheuser-Busch rejected the claim of the carpenters for certain jobs, the union organized a campaign to persuade union members and their families and friends to refrain from buying Anheuser-Busch beer.

The Justice Department's prosecution of the union's officials for organizing this campaign on a national scale was one of a series of efforts by Thurman Arnold, then Assistant Attorney General in charge of anti-trust prosecutions, to bring certain of organized labor's activities under



the Sherman Act. The brief which he and his assistants drew up advanced this simple thesis: "If a union is permitted to expand through the mere brutal use of power against neutral employers, there will be a premium on ruthless and coercive leadership. If, as this Court has said, the Sherman Act is a charter of freedom, it must include within its prohibitions the destruction of one labor organization by another through force and coercion at the expense of innocent bystanders and the tying up of the business of the public at large."

Speaking for the Court, Mr. Justice Frankfurter rejected this view of the Sherman Act, emphasizing that "whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and §20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct." The Court held that the actions of the carpenters were protected from prosecution by §20 of the Clayton Act construed in the light of the definition of a "labor dispute" in the Norris-LaGuardia Act. In the opinion of Chief Justice Hughes and Justice Roberts, on the other hand, the defendants had engaged in a secondary boycott in restraint of interstate commerce. They relied on the decisions holding that a secondary boycott violates the Sherman Act and argued that if the criminal penalties of that statute were not to apply to labor unions the exemption should be made by Congress and not the Court.

Mr. Justice Frankfurter's opinion for the majority read in part:

Whether the use of conventional, peaceful activities by a union in controversy with a rival union over certain jobs is a violation of the Sherman Law, . . . is the question. It is sharply presented in this case because it arises in a criminal prosecution. . . .

. . . Anheuser-Busch, Inc., operating a large plant in St. Louis, contracted with Borsari Tank Corporation for the erection of an additional facility. The Gaylord Container Corporation, a lessee of adjacent property from Anheuser-Busch, made a similar contract for a new building with the Stocker Company. Anheuser-Busch obtained the materials for its brewing and other operations and sold its finished products largely through interstate shipments. The Gaylord Corporation was equally dependent on interstate commerce for marketing its goods, as were the construction companies for their building materials. Among the employees of Anheuser-Busch were members of the United Brotherhood of Carpenters and Joiners of America and of the International Association of Machinists. The conflicting claims of these two organizations, affiliated with the

American Federation of Labor, in regard to the erection and dismantling of machinery had long been a source of controversy between them. Anheuser-Busch had had agreements with both organizations whereby the Machinists were given the disputed jobs and the Carpenters agreed to submit all disputes to arbitration. But in 1939 the president of the Carpenters, their general representative, and two officials of the Carpenters' local organization, the four men under indictment, stood on the claims of the Carpenters for the jobs. Rejection by the employer of the Carpenters' demand and the refusal of the latter to submit to arbitration were followed by a strike of the Carpenters, called by the defendants against Anheuser-Busch and the construction companies, a picketing of Anheuser-Busch and its tenant, and a request through circular letters and the official publication of the Carpenters that union members and their friends refrain from buying Anheuser-Busch beer.

These activities on behalf of the Carpenters formed the charge of the indictment as a criminal combination and conspiracy in violation of the Sherman Law. . . .

. . . . .

Section 1 of the Sherman Law on which the indictment rested is as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." The controversies engendered by its application to trade union activities and the efforts to secure legislative relief from its consequences are familiar history. The Clayton Act of 1914 was the result. . . . "This statute was the fruit of unceasing agitation, which extended over more than twenty years and was designed to equalize before the law the position of workingmen and employer as industrial combatants." *Duplex Co. v. Deering*, 254 U.S. 443, 484. Section 20 of that Act . . . withdrew from the general interdict of the Sherman Law specifically enumerated practices of labor unions by prohibiting injunctions against them—since the use of the injunction had been the major source of dissatisfaction—and also relieved such practices of all illegal taint by the catchall provision, "nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States." The Clayton Act gave rise to new litigation and to renewed controversy in and out of

Congress regarding the status of trade unions. By the generality of its terms the Sherman Law had necessarily compelled the courts to work out its meaning from case to case. It was widely believed that into the Clayton Act courts read the very beliefs which that Act was designed to remove. Specifically the courts restricted the scope of §20 to trade union activities directed against an employer by his own employees. *Duplex Co. v. Deering*, *supra*. Such a view it was urged, both by powerful judicial dissents and informed lay opinion, misconceived the area of economic conflict that had best be left to economic forces and the pressure of public opinion and not subjected to the judgment of courts. *Ibid.*, p. 485-486. Agitation again led to legislation and in 1932 Congress wrote the Norris-LaGuardia Act. . . .

The Norris-LaGuardia Act removed the fetters upon trade union activities, which according to judicial construction §20 of the Clayton Act had left untouched, by still further narrowing the circumstances under which the federal courts could grant injunctions in labor disputes. More especially, the Act explicitly formulated the "public policy of the United States" in regard to the industrial conflict, (\*) and by its light established that the allowable area of union activity was not to be restricted, as it had been in the Duplex case, to an immediate employer-employee relation. Therefore, whether trade union conduct constitutes a violation of the Sherman Law is to be determined only by reading the Sherman Law and §20 of the Clayton Act and the Norris-LaGuardia Act as a harmonizing text of outlawry of labor conduct.

Were, then, the acts charged against the defendants prohibited, or permitted, by these three interlacing statutes? If the facts laid in the indictment come within the conduct enumerated in §20 of the Clayton Act they do not constitute a crime within the general terms of the Sherman Law because of the explicit command of that section that such conduct shall not be "considered or held to be violations of any law of the United States." So long as a union acts in its self-interest and does not combine with non-labor groups, (\*) the licit and illicit under §20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means. There is nothing remotely within the terms of §20 that differentiates between trade union con-

duct directed against an employer because of a controversy arising in the relation between employer and employee, as such, and conduct similarly directed but ultimately due to an internecine struggle between two unions seeking the favor of the same employer. Such strife between competing unions has been an obdurate conflict in the evolution of so-called craft unionism and has undoubtedly been one of the potent forces in the modern development of industrial unions. These conflicts have intensified industrial tension but there is not the slightest warrant for saying that Congress has made §20 inapplicable to trade union conduct resulting from them.

In so far as the Clayton Act is concerned, we must therefore dispose of this case as though we had before us precisely the same conduct on the part of the defendants in pressing claims against Anheuser-Busch for increased wages, or shorter hours, or other elements of what are called working conditions. The fact that what was done was done in a competition for jobs against the Machinists rather than against, let us say, a company union is a differentiation which Congress has not put into the federal legislation and which therefore we cannot write into it.

It is at once apparent that the acts with which the defendants are charged are the kind of acts protected by §20 of the Clayton Act. The refusal of the Carpenters to work for Anheuser-Busch or on construction work being done for it and its adjoining tenant, and the peaceful attempt to get members of other unions similarly to refuse to work, are plainly within the free scope accorded to workers by §20 for "terminating any relation of employment," or "ceasing to perform any work or labor," or "recommending, advising, or persuading others by peaceful means so to do." The picketing of Anheuser-Busch premises with signs to indicate that Anheuser-Busch was unfair to organized labor, a familiar practice in these situations, comes within the language "attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working." Finally, the recommendation to union members and their friends not to buy or use the product of Anheuser-Busch is explicitly covered by "ceasing to patronize . . . any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do."

Clearly, then, the facts here charged constitute lawful conduct under the Clayton Act unless the defendants cannot invoke that Act because outsiders to the immediate dispute also shared in the conduct. But we need not determine whether the conduct is legal within the restrictions which *Duplex Co. v. Deering* gave to the immunities of §20 of the Clayton Act. Congress in the Norris-La-Guardia Act has expressed the public policy of the United States and defined its conception of a "labor dispute" in terms that no longer leave room for doubt. . . . This was done, as we recently said, in order to "obviate the results of the judicial construction" theretofore given the Clayton Act. . . . Such a dispute, §13 (c) provides, "includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."(\*) And under §13 (b) a person is "participating or interested in a labor dispute" if he "is engaged in the same industry, trade, craft, or occupation, in which such dispute occurs, or has a direct or indirect interest therein, or is a member, officer, or agent of any association composed in whole or in part of employers or employees engaged in such industry, trade, craft, or occupation."

To be sure, Congress expressed this national policy and determined the bounds of a labor dispute in an act explicitly dealing with the further withdrawal of injunctions in labor controversies. But to argue, as it was urged before us, that the *Duplex* case still governs for purposes of a criminal prosecution is to say that that which on the equity side of the court is allowable conduct may in a criminal proceeding become the road to prison. It would be strange indeed that although neither the Government nor Anheuser-Busch could have sought an injunction against the acts here challenged, the elaborate efforts to permit such conduct failed to prevent criminal liability punishable with imprisonment and heavy fines. That is not the way to read the will of Congress, particularly when expressed by a statute which, as we have already indicated, is practically and historically one of a series of enactments touching one of the most sensitive national problems. Such legislation must not be read in a spirit of mutilating narrowness. On matters far less vital and far less interrelated we have had occasion to point out

the importance of giving "hospitable scope" to Congressional purpose even when meticulous words are lacking. . . .

The relation of the Norris-LaGuardia Act to the Clayton Act is not that of a tightly drawn amendment to a technically phrased tax provision. The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction. This was authoritatively stated by the House Committee on the Judiciary. "The purpose of the bill is to protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act, October 15, 1914 . . . which act, by reason of its construction and application by the Federal courts, is ineffectual to accomplish the congressional intent." . . . The Norris-LaGuardia Act was a disapproval of *Duplex Printing Press Co. v. Deering*, *supra*, and *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn.*, 274 U.S. 37, as the authoritative interpretation of §20 of the Clayton Act, for Congress now placed its own meaning upon that section. The Norris-LaGuardia Act reasserted the original purpose of the Clayton Act by infusing into it the immunized trade union activities as redefined by the later Act. In this light §20 removes all such allowable conduct from the taint of being a "violation of any law of the United States," including the Sherman Law.

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### THE "CENTRAL PURPOSE" OF THE WAGNER ACT

*Phelps Dodge Corp. v. National Labor Relations Board*

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313 U.S. 177 (1941)

While Mr. Justice Frankfurter's opinion for the Court in this case deals in large part with the administration of the National Labor Relations Act, two of the conclusions it announced were of great significance in the interpretation of the statute itself. His opinion held first that an employer who refuses to hire employees solely because of their affiliation with a labor union is guilty of an unfair labor practice. Secondly, it construed the Wagner Act as authorizing the Board to reinstate men even though they had in the meantime found "substantially equivalent" employment.

Aside from the fact that the first of these pronouncements greatly expanded the scope of the Labor Board's authority to effectuate the policies of the Act, it was significant also in that it removed all doubt on an important question of legislative power. The Court completely repudiated the two leading cases which had denied to Congress and the states respectively power to outlaw yellow-dog contracts. *Adair v. United States*, 208 U.S. 161 (1906), *Coppage v. Kansas*, 236 U.S. 1 (1915). Justice Frankfurter disposed of the *Adair* and *Coppage* cases by stating that their "authority" had been "completely sapped" by later decisions.

Although they agreed that it is an unfair labor practice for an employer to refuse to hire workers because of union membership, Mr. Justice Stone and Chief Justice Hughes took exception to two conclusions of the majority, Justice Stone expressing their disagreement in these words:

"Congress has, we think, by the terms of the Act, excluded from the Board's power to reinstate wrongfully discharged employees, any authority to reinstate those who have 'obtained any other regular and substantially equivalent employment.' And we are not persuaded that Congress, by granting to the Board . . . authority 'to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of the Act,' has also authorized it to order the employer to hire applicants for work who have never been in his employ or to compel him to give them 'back pay' for any period whatever."

Mr. Justice Frankfurter's opinion for the Court read in part as follows:

The dominating question which this litigation brings here for the first time is whether an employer subject to the National Labor Relations Act may refuse to hire employees solely because of their affiliations with a labor union. Subsidiary questions grow out of this central issue relating to the means open to the Board to "effectuate the policies of this Act," if it finds such discrimination in hiring an unfair labor practice." Other questions touching the remedial powers of the Board are also involved. . . .

The source of the controversy was a strike, begun on June 10, 1935, by the International Union of Mine, Mill and Smelter Workers at Phelps Dodge's Copper Queen Mine, Bisbee, Arizona. Picketing of the mine continued until August 24, 1935, when the strike terminated. During the strike, the National Labor Relations Act came into force. . . . The basis of the Board's conclusion that the Corporation had committed unfair labor practices in violation of §8 (3) of the Act was a finding, not challenged here, that a number of men had been refused employment because of their affiliations with the

Union. Of these men, two, Curtis and Daugherty, had ceased to be in the Corporation's employ before the strike but sought employment after its close. The others, thirty-eight in number, were strikers. To "effectuate the policies" of the Act, §10 (c), the Board ordered the Corporation to offer Curtis and Daugherty jobs and to make them whole for the loss of pay resulting from the refusal to hire them, and it ordered thirty-seven of the strikers reinstated with back pay, and the other striker made whole for loss in wages up to the time he became unemployable. Save for a modification presently to be discussed, the Circuit Court of Appeals enforced the order affecting the strikers but struck down the provisions relating to Curtis and Daugherty.

*First.* The denial of jobs to men because of union affiliations is an old and familiar aspect of American industrial relations. Therefore, in determining whether such discrimination legally survives the National Labor Relations Act, the history which led to the Act and the aims which infuse it give direction to our inquiry. Congress explicitly disclosed its purposes in declaring the policy which underlies the Act. Its ultimate concern, as well as the source of its power, was "to eliminate the causes of certain substantial obstructions to the free flow of commerce." This vital national purpose was to be accomplished "by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association." §1. Only thus could workers ensure themselves economic standards consonant with national well-being. Protection of the workers' right to self-organization does not curtail the appropriate sphere of managerial freedom; it furthers the wholesome conduct of business enterprise. "The Act," this Court has said, "does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them." But "under cover of that right," the employer may not "intimidate or coerce its employees with respect to their self-organization and representation." When "employers freely recognize the right of their employees to their own organizations and their unrestricted right of representation there will be much less occasion for controversy in respect to the free and appropriate exercise of the right of selection and discharge." *Labor Board v. Jones & Laughlin*, 301 U.S. 1, 45, 46. This is so because of the nature of modern industrialism. Labor unions were organized "out of the necessities of the situation. . . .



Union was essential to give laborers opportunity to deal on equality with their employer." Such was the view, on behalf of the Court, of Chief Justice Taft, *American Steel Foundries v. Tri-City Council*, 257 U.S. 184, 209, after his unique practical experience with the causes of industrial unrest as co-chairman of the National War Labor Board. And so the present Act, codifying this long history, leaves the adjustment of industrial relations to the free play of economic forces but seeks to assure that the play of those forces be truly free.

It is no longer disputed that workers cannot be dismissed from employment because of their union affiliations. Is the national interest in industrial peace less affected by discrimination against union activity when men are hired? The contrary is overwhelmingly attested by the long history of industrial conflicts, the diagnosis of their causes by official investigations, the conviction of public men, industrialists and scholars. (\*) Because of the Pullman strike, Congress in the Erdman Act of 1898 prohibited inroads upon the workman's right of association by discriminatory practices at the point of hiring. (\*) Kindred legislation has been put on the statute books of more than half the states. (\*) And during the late war the National War Labor Board concluded that discrimination against union men at the time of hiring violated its declared policy that "The right of workers to organize in trade-unions and to bargain collectively . . . shall not be denied, abridged, or interfered with by the employers in any manner whatsoever." (\*) Such a policy is an inevitable corollary of the principle of freedom of organization. Discrimination against union labor in the hiring of men is a dam to self-organization at the source of supply. The effect of such discrimination is not confined to the actual denial of employment; it inevitably operates against the whole idea of the legitimacy of organization. In a word, it undermines the principle which, as we have seen, is recognized as basic to the attainment of industrial peace.

These are commonplaces in the history of American industrial relations. But precisely for that reason they must be kept in the forefront in ascertaining the meaning of a major enactment dealing with these relations. To be sure, in outlawing unfair labor practices Congress did not leave the matter at large. The practices condemned "are strictly limited to those enumerated in section 8," . . .

Section 8 (3) is the foundation of the Board's determination that in refusing employment to the two men because of their union affiliations Phelps Dodge violated the Act. And so we turn to its provisions that "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."

Unlike mathematical symbols, the phrasing of such social legislation as this seldom attains more than approximate precision of definition. That is why all relevant aids are summoned to determine meaning. Of compelling consideration is the fact that words acquire scope and function from the history of events which they summarize. We have seen the close link between a bar to employment because of union affiliation and the opportunities of labor organizations to exist and to prosper. Such an embargo against employment of union labor was notoriously one of the chief obstructions to collective bargaining through self-organization. Indisputably the removal of such obstructions was the driving force behind the enactment of the National Labor Relations Act. The prohibition against "discrimination in regard to hire" must be applied as a means toward the accomplishment of the main object of the legislation. We are asked to read "hire" as meaning the wages paid to an employee so as to make the statute merely forbid discrimination in one of the terms of men who have secured employment. So to read the statute would do violence to a spontaneous textual reading of §8 (3) in that "hire" would serve no function because, in the sense which is urged upon us, it is included in the prohibition against "discrimination in regard to . . . any term or condition of employment." Contemporaneous legislative history, (\*) and, above all, the background of industrial experience, forbid such textual mutilation.

The natural construction which the text, the legislative setting and the function of the statute command, does not impose an obligation on the employer to favor union members in hiring employees. He is as free to hire as he is to discharge employees. The statute does not touch "the normal exercise of the right of the employer to select its employees or to discharge them." It is directed solely against the abuse of that right by interfering with the countervailing right of self-organization.

We have already recognized the power of Congress to deny an

employer the freedom to discriminate in discharging. *Labor Board v. Jones & Laughlin*, 301 U.S. 1. So far as questions of constitutionality are concerned we need not enlarge on the statement of Judge Learned Hand in his opinion below that there is "no greater limitation in denying him [the employer] the power to discriminate in hiring, than in discharging." The course of decisions in this Court since *Adair v. United States*, 208 U.S. 161, and *Coppage v. Kansas*, 236 U.S. 1, have completely sapped those cases of their authority. . . .

*Second.* Since the refusal to hire Curtis and Daugherty solely because of their affiliation with the Union was an unfair labor practice under §8 (3), the remedial authority of the Board under §10 (c) became operative. Of course it could issue, as it did, an order "to cease and desist from such unfair labor practice" in the future. Did Congress also empower the Board to order the employer to undo the wrong by offering the men discriminated against the opportunity for employment which should not have been denied them?

Reinstatement is the conventional correction for discriminatory discharges. Experience having demonstrated that discrimination in hiring is twin to discrimination in firing, it would indeed be surprising if Congress gave a remedy for the one which it denied for the other. The powers of the Board as well as the restrictions upon it must be drawn from §10 (c), which directs the Board "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." It could not be seriously denied that to require discrimination in hiring or firing to be "neutralized," *Labor Board v. Mackay Co.*, 304 U.S. 333, 348, by requiring the discrimination to cease not abstractly but in the concrete victimizing instances, is an "affirmative action" which "will effectuate the policies of this Act." Therefore, if §10 (c) had empowered the Board to "take such affirmative action as will effectuate the policies of this Act," the right to restore to a man employment which was wrongfully denied him could hardly be doubted. Even without such a mandate from Congress this Court compelled reinstatement to enforce the legislative policy against discrimination represented by the *Railway Labor Act*. *Texas & N.O.R. Co. v. Railway Clerks*, 281 U.S. 548. (\*) Attainment of a great national policy through expert administration in col-

laboration with limited judicial review must not be confined within narrow canons for equitable relief deemed suitable by chancellors in ordinary private controversies. . . . To differentiate between discrimination in denying employment and in terminating it, would be a differentiation not only without substance but in defiance of that against which the prohibition of discrimination is directed.

But, we are told, this is precisely the differentiation Congress has made. It has done so, the argument runs, by not directing the Board "to take such affirmative action as will effectuate the policies of this Act," *simpliciter*, but, instead, by empowering the Board "to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act." To attribute such a function to the participial phrase introduced by "including" is to shrivel a versatile principle to an illustrative application. We find no justification whatever for attributing to Congress such a casuistic withdrawal of the authority which, but for the illustration, it clearly has given the Board. The word "including" does not lend itself to such destructive significance. . . .

*Third.* We agree with the court below that the record warrants the Board's finding that the strikers were denied reemployment because of their union activities. Having held that the Board can neutralize such discrimination in the case of men seeking new employment, the Board certainly had this power in regard to the strikers. And so we need not consider whether the order concerning the strikers should stand, as the court below held it should, even though that against Curtis and Daugherty would fall.

*Fourth.* There remain for consideration the limitations upon the Board's power to undo the effects of discrimination. Specifically, we have the question of the Board's power to order employment in cases where the men discriminated against had obtained "substantially equivalent employment." . . .

To deny the Board power to neutralize discrimination merely because workers have obtained compensatory employment would confine the "policies of this Act" to the correction of private injuries. The Board was not devised for such a limited function. It is the agency of Congress for translating into concreteness the purpose of safeguarding and encouraging the right of self-organization. The

Board, we have held very recently, does not exist for the "adjudication of private rights"; it "acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining." *National Licorice Co. v. Labor Board*, 309 U.S. 350, 362; . . . To be sure, reinstatement is not needed to repair the economic loss of a worker who, after discrimination, has obtained an equally profitable job. But to limit the significance of discrimination merely to questions of monetary loss to workers would thwart the central purpose of the Act, directed as that is toward the achievement and maintenance of workers' self-organization. That there are factors other than loss of wages to a particular worker to be considered is suggested even by a meager knowledge of industrial affairs. Thus, to give only one illustration, if men were discharged who were leading efforts at organization in a plant having a low wage scale, they would not unnaturally be compelled by their economic circumstances to seek and obtain employment elsewhere at equivalent wages. In such a situation, to deny the Board power to wipe out the prior discrimination by ordering the employment of such workers would sanction a most effective way of defeating the right of self-organization.

Therefore, the mere fact that the victim of discrimination has obtained equivalent employment does not itself preclude the Board from undoing the discrimination and requiring employment. But neither does this remedy automatically flow from the Act itself when discrimination has been found. A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application. There is an area plainly covered by the language of the Act and an area no less plainly without it. But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable

area of the Board's discretion and must guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy. On the other hand, the power with which Congress invested the Board implies responsibility—the responsibility of exercising its judgment in employing the statutory powers.

The Act does not create rights for individuals which must be vindicated according to a rigid scheme of remedies. It entrusts to an expert agency the maintenance and promotion of industrial peace. According to the experience revealed by the Board's decisions, the effectuation of this important policy generally requires not only compensation for the loss of wages but also offers of employment to the victims of discrimination. Only thus can there be a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination. But even where a worker has not secured equivalent employment, the Board, under particular circumstances, may refuse to order his employment because it would not effectuate the policies of the Act. It has, for example, declined to do so in the case of a worker who had been discharged for union activities and had sought reemployment after having offered his services as a labor spy. . . .

From the beginning the Board has recognized that a worker who has obtained equivalent employment is in a different position from one who has lost his job as well as his wages through an employer's unfair labor practice. In early decisions, the Board did not order reinstatement of workers who had secured such equivalent employment. . . . It apparently focused on the absence of loss of wages in determining the applicable remedy. But other factors may well enter into the appropriateness of ordering the offending employer to offer employment to one illegally denied it. Reinstatement may be the effective assurance of the right of self-organization. Again, without such a remedy industrial peace might be endangered because workers would be resentful of their inability to return to jobs to which they may have been attached and from which they were wrongfully discharged. On the other hand, it may be, as was urged on behalf of the Board . . . that, in making such an order for reinstatement the necessity for making room for the old employees by discharging new ones, as well as questions affecting the dislocation of the business, ought to be considered. All these and other factors

outside our domain of experience may come into play. Their relevance is for the Board, not for us. In the exercise of its informed discretion the Board may find that effectuation of the Act's policies may or may not require reinstatement. We have no warrant for speculating on matters of fact the determination of which Congress has entrusted to the Board. All we are entitled to ask is that the statute speak through the Board where the statute does not speak for itself.

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### LABOR INJUNCTIONS AND THE GOVERNMENT AS "EMPLOYER"

*United States v. United Mine Workers of America*

330 U.S. 258, 307 (1947)

The War Labor Disputes Act of 1943 authorized the seizure of facilities necessary for the war effort if and when the President found and proclaimed that strikes and other labor disturbances were interrupting the operation of such facilities. By virtue of this authority and in his capacity as Commander in Chief of the Army and Navy, President Truman issued an executive order on May 21, 1946, directing Secretary of the Interior Krug to take possession and operate the Nation's bituminous coal mines. The private managers were retained as operating managers for the Government, and the Secretary of the Interior was directed to negotiate with representatives of the miners on the terms and conditions of employment.

On May 29, Krug, as Coal Mines Administrator, and John L. Lewis, as President of the United Mine Workers of America, entered into an agreement making certain changes in the National Bituminous Coal Wage Agreement of 1945 favorable to the mine workers. The Krug-Lewis agreement stipulated that the terms and conditions of employment it embodied were to remain in effect during the "period of Government possession."

On October 21, Lewis in a letter to Krug accused the government of breaching its contract with the union and reminded him that Section 15 of the National Bituminous Coal Wage Agreement allowed either party to terminate the Agreement after due notice. The Government denied that this termination clause was preserved by the Krug-Lewis Agreement, urged the miners to negotiate with the owners, but agreed to meet with

union officials. Conferences were held, but on November 15, Lewis wrote to Krug that the Agreement would be terminated on November 20. Copies of the November 15 letter were circulated by Lewis to the mine workers.

Taking the position that in view of the miners' policy of "No contract, no work" the November 15 letter was in reality a strike notice, the Government on November 18 requested the District Court for the District of Columbia to determine that neither the union nor Lewis could legally terminate the Krug-Lewis Agreement and to grant a temporary restraining order pending final adjudication of the dispute. The District Court issued a preliminary injunction and, when the walkout continued, found Lewis and the union guilty of contempt of Court for willfully violating the restraining order. Lewis was fined \$10,000 and the union \$3,500,000.

The chief argument which counsel for Lewis and the union urged on the courts was that, inasmuch as the Norris-LaGuardia Act deprived federal courts of jurisdiction to issue injunctions in labor disputes, the District Court's temporary restraining order was void because the case involved and grew out of a labor dispute. Speaking for the majority, Chief Justice Vinson announced on March 6, 1947, that the Supreme Court had come to "a contrary decision." The Court held that the anti-injunction provisions of the Clayton Act and the Norris-LaGuardia Act were intended by Congress to apply to disputes between private employers and their employees and not to a strike against the United States. The Court could not construe the term "employer" in the Norris-LaGuardia Act to include the United States "where there is no express reference to the United States and no evident affirmative grounds for believing that Congress intended to withhold an otherwise available remedy from the Government." Moreover, even if the Norris-LaGuardia Act were applicable, the District Court had power to issue a restraining order for the purpose of preserving existing conditions, pending a final determination of its jurisdiction to issue the injunction. The fine on the union was reduced to \$700,000 on condition that it comply with that order within five days.

In a joint opinion, concurring in part and dissenting in part, Justices Black and Douglas agreed that the government was not barred by the Norris-LaGuardia Act or the War Labor Disputes Act from securing the injunction in this case, because Congress did not intend "to treat the Government employer-employee relationship as giving rise to a 'labor dispute' in the industrial sense." They thought that civil sanctions would have sufficed and objected to the \$700,000 criminal fine imposed on the union.

Justices Murphy and Rutledge wrote separate dissenting opinions, in-



sisting that for all practical purposes the miners remained private employees even after the government "seized" the mines and that, as Justice Murphy phrased it, "the important point . . . is that Congress has decreed that strikes and labor disturbances growing out of private labor disputes are to be dealt with by some means other than federal court restraining orders and injunctions." Mr. Justice Murphy thought that the Court's decision carried dangerous implications for the future of labor relations in the United States: "If seizure alone justifies an injunction contrary to the expressed will of Congress, some future Government could easily utilize seizure as a subterfuge for breaking any or all strikes in private industries. Under some war-time or emergency power, it could seize private properties at the behest of the employers whenever a strike threatened or occurred on a finding that the public interest was in peril. A restraining order could then be secured on the specious theory that the Government was acting in relation to its own employees. The workers would be effectively subdued under the impact of the restraining order and contempt proceedings. After the strike was broken, the properties would be handed back to the private employers. That essentially is what has happened in this case."

Mr. Justice Frankfurter agreed that the District Court had the power to preserve existing conditions while it was determining its authority to grant injunctive relief and stressed the importance of having persons obey court decrees until the power to issue them is adjudicated by orderly process. His opinion concurring in the Court's judgment is devoted in the main, however, to a careful and detailed exposition of his view that neither in the Norris-LaGuardia Act nor the War Labor Disputes Act of 1943 had Congress intended to exempt the government from the ban on injunctions in labor disputes:

The historic phrase "a government of laws and not of men" epitomizes the distinguishing character of our political society. When John Adams put that phrase into the Massachusetts Declaration of Rights he was not indulging in a rhetorical flourish. He was expressing the aim of those who, with him, framed the Declaration of Independence and founded the Republic. "A government of laws and not of men" was the rejection in positive terms of rule by fiat, whether by the fiat of governmental or private power. Every act of government may be challenged by an appeal to law, as finally pronounced by this Court. Even this Court has the last say only for a time. Being composed of fallible men, it may err. But revision of its errors must be by orderly process of law. The Court may be

asked to reconsider its decisions, and this has been done successfully again and again throughout our history. Or, what this Court has deemed its duty to decide may be changed by legislation, as it often has been, and, on occasion, by constitutional amendment.

But from their own experience and their deep reading in history, the Founders knew that Law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised. . . . The conception of a government by laws dominated the thoughts of those who founded this Nation and designed its Constitution, although they knew as well as the belittlers of the conception that laws have to be made, interpreted and enforced by men. To that end, they set apart a body of men, who were to be the depositories of law, who by their disciplined training and character and by withdrawal from the usual temptations of private interest may reasonably be expected to be "as free, impartial, and independent as the lot of humanity will admit." So strongly were the framers of the Constitution bent on securing a reign of law that they endowed the judicial office with extraordinary safeguards and prestige. No one, no matter how exalted his public office or how righteous his private motive, can be judge in his own case. That is what courts are for. And no type of controversy is more peculiarly fit for judicial determination than a controversy that calls into question the power of a court to decide. Controversies over "jurisdiction" are apt to raise difficult technical problems. They usually involve judicial presuppositions, textual doubts, confused legislative history, and like factors hardly fit for final determination by the self-interest of a party.

Even when a statute deals with a relatively uncomplicated matter, and the "words in their natural sense as they would be read by the common man" would appear to give an obvious meaning, considerations underlying the statute have led this Court to conclude that "the words cannot be taken quite so simply." . . . How much more true this is of legislation like the Norris-LaGuardia Act. This Act altered a long process of judicial history, but altered it by a scheme of complicated definitions and limitations.

The Government here invoked the aid of a court of equity in circumstances which certainly were not covered by the Act with inescapable clarity. Colloquially speaking, the Government was

"running" the mines. But it was "running" them not as an employer, in the sense that the owners of the coal mines were the employers of the men the day before the Government seized the mines. Nor yet was the relation between the Government and the men like the relation of the Government to the civil service employees in the Department of the Interior. It would be naïve or wilful to assert that the scope of the Norris-LaGuardia Act in a situation like that presented by this bill raised a question so frivolous that any judge should have summarily thrown the Government out of court without day. Only when a court is so obviously traveling outside its orbit as to be merely usurping judicial forms and facilities, may an order issued by a court be disobeyed and treated as though it were a letter to a newspaper. Short of an indisputable want of authority on the part of a court, the very existence of a court presupposes its power to entertain a controversy, if only to decide, after deliberation, that it has no power over the particular controversy. Whether a defendant may be brought to the bar of justice is not for the defendant himself to decide.

To be sure, an obvious limitation upon a court cannot be circumvented by a frivolous inquiry into the existence of a power that has unquestionably been withheld. Thus, the explicit withdrawal from federal district courts of the power to issue injunctions in an ordinary labor dispute between a private employer and his employees cannot be defeated, and an existing right to strike thereby impaired, by pretending to entertain a suit for such an injunction in order to decide whether the court has jurisdiction. In such a case, a judge would not be acting as a court. He would be a pretender to, not a wielder of, judicial power.

That is not this case. It required extended arguments, lengthy briefs, study and reflection preliminary to adequate discussion in conference, before final conclusions could be reached regarding the proper interpretation of the legislation controlling this case. A majority of my brethren find that neither the Norris-LaGuardia Act nor the War Labor Disputes Act limited the power of the district court to issue the orders under review. I have come to the contrary view. But to suggest that the right to determine so complicated and novel an issue could not be brought within the cognizance of the district court, and eventually of this Court, is to deny the place of the judiciary in our scheme of government. And if the district

court had power to decide whether this case was properly before it, it could make appropriate orders so as to afford the necessary time for fair consideration and decision while existing conditions were preserved. To say that the authority of the court may be flouted during the time necessary to decide is to reject the requirements of the judicial process.

It does not mitigate such defiance of law to urge that hard-won liberties of collective action by workers were at stake. The most prized liberties themselves presuppose an independent judiciary through which these liberties may be, as they often have been, vindicated. When in a real controversy, such as is now here, an appeal is made to law, the issue must be left to the judgment of courts and not the personal judgment of one of the parties. This principle is a postulate of our democracy.

And so I join the opinion of the Court insofar as it sustains the judgment for criminal contempt upon the broad ground of vindicating the process of law. (\*) The records of this Court are full of cases, both civil and criminal, involving life or land or small sums of money, in which the Court proceeded to consider a federal claim that was not obviously frivolous. It retained such cases under its power until final judgment, though the claim eventually turned out to be unfounded and the judgment was one denying the jurisdiction either of this Court or of the court from which the case came. In the case before us, the District Court had power "to preserve the existing conditions" in the discharge of "its duty to permit argument and to take the time required for such consideration as it might need" to decide whether the controversy involved a labor dispute to which the Norris-LaGuardia Act applied. . . .

In our country law is not a body of technicalities in the keeping of specialists or in the service of any special interest. There can be no free society without law administered through an independent judiciary. If one man can be allowed to determine for himself what is law, every man can. That means first chaos, then tyranny. Legal process is an essential part of the democratic process. For legal process is subject to democratic control by defined, orderly ways which themselves are part of law. In a democracy, power implies responsibility. The greater the power that defies law the less tolerant can this Court be of defiance. As the Nation's ultimate judicial tribunal, this Court, beyond any other organ of society, is

the trustee of law and charged with the duty of securing obedience to it.

It only remains to state the basis of my disagreement with the Court's views on the bearing of the Norris-LaGuardia Act, . . . and the War Labor Disputes Act . . . As to the former, the Court relies essentially on a general doctrine excluding the Government from the operation of a statute in which it is not named, and on the legislative history of the Act. I find the countervailing considerations weightier. The Norris-LaGuardia Act deprived the federal courts of jurisdiction to issue injunctions in labor disputes except under conditions not here relevant. The question before a court of equity therefore is whether a case presents a labor dispute as defined by the Act. Section 13 (c) defines "labor disputes":

"The term 'labor dispute' includes any controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee."

That the controversy before the district court comes within this definition does not need to be labored. The controversy arising under the Lewis-Krug contract concerned "terms or conditions of employment" and was therefore a "labor dispute," whatever further radiations the dispute may have had. The Court deems it appropriate to interpolate an exception regarding labor disputes to which the Government is a party. It invokes a canon of construction according to which the Government is excluded from the operation of general statutes unless it is included by explicit language.

The Norris-LaGuardia Act has specific origins and definite purposes and should not be confined by an artificial canon of construction. The title of the Act gives its scope and purpose, and the terms of the Act justify its title. It is an Act "to define and limit the jurisdiction of courts sitting in equity." It does not deal with the rights of parties but with the power of the courts. Again and again the statute says "no court shall have jurisdiction," or an equivalent phrase. Congress was concerned with the withdrawal of power from the federal courts to issue injunctions in a defined class of cases. Nothing in the Act remotely hints that the withdrawal of this power turns on the character of the parties. The only reference to parties underscores their irrelevance to the issue of jurisdiction, for the

power of the courts is withdrawn in a labor dispute "regardless of whether or not the disputants stand in the proximate relation of employer and employee." The limitation on the jurisdiction of the court depends entirely on the subject matter of the controversy. Section 13 (a) defines it:

"A case shall be held to involve or to grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation; or have direct or indirect interests therein; or who are employees of the same employer; or who are members of the same or an affiliated organization of employers or employees . . . "

Neither the context nor the content of the Act qualifies the terms of that section. Did not the suit brought by the Government against Lewis and the United Mine Workers "grow out of a labor dispute" within the terms of §13 (a)?

As already indicated, the Court now finds an exception to the limitation which the Norris-LaGuardia Act placed upon the equity jurisdiction of the district court, not in the Act but outside it. It invokes a canon of construction that a sovereign is presumptively not intended to be bound by its own statute unless named in it. At best, this canon, like other generalities about statutory construction, is not a rule of law. Whatever persuasiveness it may have in construing a particular statute derives from the subject matter and the terms of the enactment in its total environment. . . . It is one thing to read a statute so as not to bind the sovereign by restrictions, or to impose upon it duties, which are applicable to ordinary citizens. It is quite another to interpolate into a statute limiting the jurisdiction of a court, the qualification that such limitation does not apply when the Government invokes the jurisdiction. No decision of this Court gives countenance to such a doctrine of interpolation. The text, context, content and historical setting of the Norris-LaGuardia Act all converge to indicate the unrestricted withdrawal by Congress from the federal district courts of the power to issue injunctions in labor disputes, excepting only under circumstances explicitly defined and not here present. The meaning which a reading of the text conveys and which is confirmed by the history which led Congress to free the federal courts from entanglements in these

industrial controversies through use of the injunction, ought not to be subordinated to an abstract canon of construction that carries the residual flavor of the days when a personal sovereign was the lawmaker.

Moreover, the rule proves too much. If the United States must explicitly be named to be affected, the limitations imposed by the Norris-LaGuardia Act upon the district court's jurisdiction could not deprive the United States of the remedies it theretofore had. Accordingly, the courts would not be limited in their jurisdiction when the United States is a party and the Act would not apply in any proceeding in which the United States is complainant. It would mean that, in order to protect the public interest, which may be jeopardized just as much whether an essential industry continued under private control or has been temporarily seized by the Government, a court could, at the behest of the Attorney General of the United States, issue an injunction as courts did when they issued the Debs, the Hayes and the Railway Shopmen's injunctions.(\*). But it was these very injunctions, secured by the Attorney General of the United States under claim of compelling public emergency, that gave the most powerful momentum to the enactment of the Norris-LaGuardia Act. This history is too familiar to be rehearsed. It is surely surprising to conclude that when a long and persistent effort to take the federal courts out of the industrial conflict, insofar as the labor injunction put them into it, found its way to the statute books, the Act failed to meet the grievances that were most dramatic and deepest in the memory of those most concerned with the legislation.

It is urged, however, that legislative history cuts down what might otherwise be the scope of the Act. Reliance is placed on statements by two Representatives during the House debates on the Bill, calculated to show that Congress purposed to exclude from the limitation of the jurisdiction of the district courts labor disputes involving "employees" of the Government, at least where injunctions are sought by the Attorney General. Since both statements came from spokesmen for the Bill, they carry weight. The nature of these remarks, the circumstances under which they were delivered, as well as their setting, define their meaning and the significance to be given them as a gloss upon the Act.

There was before the House an Amendment by Representative Blanton which would have made the Act applicable "except where the United States Government is the petitioner." . . . Representative LaGuardia opposed the Amendment, remarking "I do not see how in any possible way the United States can be brought in under the provisions of this bill." If this is to be read apart from the meaning afforded by the context of the debates and the whole course of the legislation, it would mean that the jurisdiction to grant a Debs injunction continued unaffected. No one would have been more startled by such a conclusion than Mr. LaGuardia. The fact is that a situation like the present, where the Government for a time has some relation to a labor dispute in an essentially private industry, was evidently not in the thought of Congress. Certainly it was not discussed. Mr. LaGuardia's statement regarding the position of the United States under the Act followed his reading of §13 (b) under which a person is to be deemed interested in a labor dispute only if "engaged in the same industry, trade, craft, or occupation in which such dispute occurs." His brief, elliptical remark plainly conveyed that the business of the Government of the United States is not an "industry, trade, craft, or occupation." This is made unequivocally clear by the colloquy that followed. Mr. Blanton inquired whether Mr. LaGuardia was willing "for the Army and the Navy to form a labor union and affiliate themselves with the American Federation of Labor and not permit the Government of the United States to preserve its rights?" The short answer for Mr. LaGuardia to have made was "The United States is not subject to the provisions of the Act, because by employer we mean a private employer." Instead of that, Mr. LaGuardia replied, "Oh, the Army and the Navy are not in a trade, craft, or occupation." In short, the scope of the limitation upon the jurisdiction of the courts depended not on party, but on subject matter. Representative Blanton's amendment was rejected by 125 to 21.

The second Representative upon whom the Court relies is Mr. Michener. He said, "Be it remembered that this bill does not attempt to legislate concerning Government employees. I do not believe that the enactment of this bill into law will take away from the Federal Government any rights which it has under existing law, to seek and obtain injunctive relief where the same is necessary for the functioning of the Government." . . . Later he added, ". . . This



deals with labor disputes between individuals, not where the Government is involved. It is my notion that under this bill the Government can function with an injunction, if that is necessary in order to carry out the purpose of the Government. I should like to see this clarified, but I want to go on record as saying that under my interpretation of this bill the Federal Government will not at any time be prevented from applying for an injunction, if one is necessary in order that the Government may function." . . . What Mr. Michener gave as *his* interpretation of what survived the Norris-LaGuardia Act, was precisely the claim of the Government in asking for the Debs injunction. That injunction was sought and granted in order that the Government might function. Insofar, then, as Mr. Michener's statements imply that the United States could again get a Debs injunction, his understanding is belied by the whole history of the legislation, as reflected in its terms. (\*) These statements can only mean, then, that if, say, employees in the Treasury Department had to be enjoined so that government could go on, it was Representative Michener's view that an injunction could issue. No attempt was made to make this view explicit in the Act. It was not discussed, and only one statement appears to share it. (\*) In any event, it does not imply a broader exemption than that of which Representative LaGuardia spoke.

It is to be noted that the discussion in the House followed passage in the Senate of that which subsequently became the Act. It is a matter of history that the Senate Judiciary Committee was the drafting and driving force behind the Bill. The Bill had extended consideration by a subcommittee of the Senate Judiciary Committee followed by weighty reports and full discussion on the Senate floor. We are not pointed to a suggestion or a hint in the Senate proceedings that the withdrawal of jurisdiction to issue injunctions in labor disputes was subject to a latent exception as to injunctions sought by the Government. The whole contemporaneous history is against it. The experience which gave rise to the Norris-LaGuardia Act only underscores the unrestricted limitation upon the jurisdiction of the courts, except in situations of which this is not one. To find implications in the fact that in the course of the debates it was not explicitly asserted that the district courts could not issue an injunction in a labor controversy even at the behest of the Government is to find the silence of Congress more revealing than the natural mean-

ing of legislation and the history which begot it. The remarks of Mr. LaGuardia and Mr. Michener ought not to be made the equivalent of writing an amendment into the Act. It is one thing to draw on all relevant aids for shedding light on the dark places of a statute. To allow inexplicit remarks in the give-and-take of debate to contradict the very terms of legislation and the history behind it is to put out the controlling light on meaning shed by the explicit provisions of an Act in its setting.

But even if we assume that the Act was not intended to apply to labor disputes involving "employees" of the United States, are the miners in the case before us "employees" of the United States within the meaning of this interpolated exception? It can hardly be denied that the relation of the miners to the United States is a hybrid one. Clearly, they have a relation to the Government other than that of employees of plants not under Government operation. Equally clearly, they have a relation and a status different from the relation and status of the clerks at the Treasury Department. Never in the country's history have the terms of employment of the millions in Government service been established by collective bargaining. But the conditions of employment—hours, wages, holidays, vacations, health and welfare programs, etc.—were so fixed for the miners during the period of Government seizure. The proper interpretation of this collective agreement between the Government and the United Mine Workers is precisely what is at the bottom of this controversy. Neither a spontaneous nor a sophisticated characterization would resort to the phrase "Government employees" without more, in speaking of the miners during the operation of the mines by the Government. The only concrete characterization of the status of employees in seized plants was expressed by Under Secretary Patterson at a hearing on the predecessor bill to that which became the law under which this seizure was made. He spoke of the role of the Government as that of "A receiver that would be charged with the continuity of operation of the plant."(\*) Nothing in the Acts authorizing seizure of private plants indicates that the employees of these plants were to be considered employees of the United States in the usual and natural meaning of the term. In the full debates on bills providing for Government seizure of plants, Congressional leaders clearly indicated their understanding that as the law then stood there could be no injunctions in labor disputes in seized plants. (\*)

But not only was such the understanding when the legal question emerged in the course of considering the need of war legislation. Recent legislation and its history are relevant not merely because they show later understanding of the terms of an older statute. The War Labor Disputes Act of 1943 is directly and primarily involved in this case. The whole controversy arises under the authority to seize mines given by that Act. The real question before us is whether in authorizing such seizure and operation Congress also gave to the United States the right to prevent interference with its statutory operation through the equitable remedies here invoked.

By the War Labor Disputes Act, Congress created a new relationship among the Government, the plant owners, the employees. The rights, duties, remedies incident to that relation are those given by the Act. Congress naturally addressed itself to possible interferences with the Government's operation of seized plants. It dealt specifically with this subject. It gave the Government specific remedies which it might invoke against such interferences. (\*) Remedy by injunction was not given. It was not merely omitted. A fair reading of the legislative history shows that it was expressly and definitively denied. As reported out of the Senate Committee, S. 796 provided for plant seizure. It did not include the injunction among the remedies for interference with Government operation. (\*) But when the Bill reached the floor of the Senate, Senator Connally, sponsor of the Bill, offered and urged an amendment giving the district courts jurisdiction to restrain violations of the measure. (\*) He accepted, somewhat reluctantly, the amendment of Senator Wagner to limit the proposed amendment to an injunction at the behest of the Attorney General, precisely as was here sought and granted. (\*) On motion of Senator Danaher, this proposal was rejected by the Senate after full debate, (\*) participated in by Senators especially conversant with the history and scope of the existing remedies available to the Government. With this remedy denied to the Government, the Bill was passed and sent to the House. (\*) The House did not like the Bill. Its version did not see fit specifically to add to the limited seizure provisions of the Selective Service Act of 1940, although apparently it assumed that there could be seizure under existing law in the case of failure by defense plants to produce as a result of labor troubles. Instead, the House version provided stringent anti-strike and anti-lockout provisions as to plants in private operation, and by specific amendment to the Norris-LaGuardia Act

the district courts were authorized to restrain violations of such provisions. But this *pro tanto* repeal of the Norris-LaGuardia Act was not made available to the United States as a remedy against interference with operation of plants seized under the earlier, 1940 Act. (\*)

The bill then went to conference. What came out was, so far as here material, the bill that had passed the Senate. The United States was granted power to seize and operate defense plants whose production was hampered by labor disputes. Specific remedies were formulated by Congress against interference with the Government's operation. The injunction was not included. (\*) In neither house was further attempt made to reintroduce the Connally proposal giving the Government relief by injunction. Nor was it suggested that the Government had such redress under existing law. On the floor of the Senate, Senator Thomas of Utah, Chairman of the Committee on Education and Labor, said:

"Mr. President, I ask the Senator from New Mexico [Mr. Hatch], the Senator from Connecticut [Mr. Danaher], and the Senator from Texas [Mr. Connally], the sponsor of the bill, whether there is a unanimous opinion on the part of those three great lawyers that there will not be a reopening of the district courts to industry-labor disputes? . . . I should like that point to be made so firmly and so strongly that no lawyer in the land who would like to take advantage of the situation created by the mere mention of the words 'district court' will resort to the court in order to confuse our industry-labor relations."

Mr. Connally answered:

"Mr. President, . . . I think I speak for the Senator from Vermont and the Senator from New Mexico and the Senator from Connecticut and also the Senator from Indiana [Mr. Van Nuys], although he is not present, when I say that there is no jurisdiction whatever conferred by this bill providing for resort to the United States district court, except the one mentioned by the Senator from Connecticut, which is merely the right to go there for a civil action for damages, and no jurisdiction whatever is given over labor disputes. Does that answer the Senator?"

"Mr. Thomas of Utah. I thank the Senator for making that statement and I hope it will satisfy the lawyers of the country.

"Mr. Connally. I am sure it will." (\*)

Under these circumstances the Bill became law, and the seizure giving rise to this controversy was made under that law. The separate items of this legislative history cannot be judged in isolation. They must be considered together, and as part of the course of legislation dealing with injunctions in labor disputes. To find that the Government has the right which Senator Connally's amendment sought to confer but which the Congress withheld is to say that voting down the amendment had the same effect as voting it up.

Events since the passage of the Act underscore what would appear to be the controlling legislative history of the War Labor Disputes Act, and prove that Congress saw fit not to authorize district courts to issue an injunction in cases like this. To meet the grave crisis growing out of the strike on the railroads last May, Congress, upon the recommendation of the President and the Attorney General, deemed additional legislation necessary for dealing with labor disputes. The proposals in each house carried a provision which authorized an injunction to issue for violation of the War Labor Disputes Act. (\*) Senator Mead proposed an amendment to delete the provisions for injunctions. (\*) In the debates that followed no one suggested that the new proposal was unnecessary, that the jurisdiction proposed to be conferred already existed, or that if granted, as requested by the Attorney General, it would not, as Senator Mead claimed, repeal *pro tanto* the Norris-LaGuardia Act. The debates show clearly that what was contemplated was a change in the War Labor Disputes Act, whereby a new and an additional remedy would be authorized. (\*) The Bill never became law.

As is well known, as the debates clearly show, as Senator Connally admitted, the War Labor Disputes Act was directed primarily against stoppage in the coal mines. (\*) The situation that Congress feared was exactly that which has occurred and which underlies this controversy. To deal with the situation, Congress gave the United States the power to seize the mines. To effectuate this power, the Government was given authority to invoke criminal penalties for interferences with the operation of the mines. Senator Connally sought more. He wanted Congress to empower the district courts to enjoin interference. The Senate did not want an injunction to issue and voted the proposal down. The Senate's position was adopted by the Conference Committee. The House of Representatives yielded its view and approved the Conference report. The whole course of legislation indicates that Congress withheld the remedy

of injunction. This Court now holds that Congress authorized the injunction.

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### "THE PRIVATE POWER OF UNIONS"

*American Federation of Labor v. American Sash and Door Company*

335 U.S. 538, 542 (1949)

In the opinion which is printed below, Mr. Justice Frankfurter is concurring in decisions which vindicated the right of the states to outlaw agreements to employ only members of labor unions. The Court had before it a 1947 North Carolina statute and constitutional amendments adopted in Nebraska and Arizona at the 1946 general elections forbidding employers to obligate themselves to use only union labor. These provisions were assailed on several constitutional grounds, including the claim that they violated the rights of free speech, assembly, and petition. The latter argument was dismissed by Mr. Justice Black, who was the Court's spokesman in these cases, with the simple assertion: "There cannot be wrung from a constitutional right of workers to assemble to discuss improvement of their own working standards, a further constitutional right to drive from remunerative employment all other persons who will not or can not, participate in union assemblies." (Quoted from his opinion in the companion case, *Lincoln Federal Labor Union v. Northwestern Iron and Metal company*, 335 U.S. 525.)

Curiously enough, however, chief reliance seems to have been placed on those due process cases which limited the power of legislatures to curtail the employer's freedom of action in dealing with his employees, such as the decisions invalidating the ban on yellow-dog contracts. After showing how far the Court has moved away from this old line of cases, Mr. Justice Black concluded: "Just as we have held that the due process clause erects no obstacles to block legislative protection of union members, we now hold that legislative protection can be afforded non-union workers."

Mr. Justice Frankfurter's opinion read in part:

Arizona, Nebraska, and North Carolina have passed laws forbidding agreements to employ only union members. The United States Constitution is invoked against these laws. Since the cases bring

into question the judicial process in its application to the Due Process Clause, explicit avowal of individual attitudes towards that process may elucidate and thereby strengthen adjudication. Accordingly, I set forth the steps by which I have reached concurrence with my brethren on what I deem the only substantial issue here, on all other issues joining the Court's opinion.

The coming of the machine age tended to despoil human personality. It turned men and women into "hands." The industrial history of the early Nineteenth Century demonstrated the helplessness of the individual employee to achieve human dignity in a society so largely affected by technological advances. Hence the trade union made itself increasingly felt, not only as an indispensable weapon of self-defense on the part of workers but as an aid to the well-being of a society in which work is an expression of life and not merely the means of earning subsistence. But unionization encountered the shibboleths of a pre-machine age and these were reflected in juridical assumptions that survived the facts on which they were based. Adam Smith was treated as though his generalizations had been imparted to him on Sinai and not as a thinker who addressed himself to the elimination of restrictions which had become fetters upon initiative and enterprise in his day. Basic human rights expressed by the constitutional conception of "liberty" were equated with theories of *laissez faire*.(\*) The result was that economic views of confined validity were treated by lawyers and judges as though the Framers had enshrined them in the Constitution. This misapplication of the notions of the classic economists and resulting disregard of the perduring reach of the Constitution led to Mr. Justice Holmes' famous protest in the *Lochner* case against measuring the Fourteenth Amendment by Mr. Herbert Spencer's Social Statics. 198 U.S. 45, 75. Had not Mr. Justice Holmes' awareness of the impermanence of legislation as against the permanence of the Constitution gradually prevailed, there might indeed have been "hardly any limit but the sky" to the embodiment of "our economic or moral beliefs" in that Amendment's "prohibitions." *Baldwin v. Missouri*, 281 U.S. 586, 595.

The attitude which regarded any legislative encroachment upon the existing economic order as infected with unconstitutionality led to disrespect for legislative attempts to strengthen the wage-earner's bargaining power. . . . But when the tide turned, it was not merely

because circumstances had changed and there had arisen a new order with new claims to divine origin. The opinion of Mr. Justice Brandeis in *Senn v. Tile Layers Union*, 301 U.S. 468, shows the current running strongly in the new direction—the direction not of social dogma but of increased deference to the legislative judgment. “Whether it was wise,” he said, now speaking for the Court and not in dissent, “for the State to permit the unions to [picket] is a question of its public policy—not our concern.” *Id.* at 481. Long before that, in *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 488, he had warned:

“All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community. The conditions developed in industry may be such that those engaged in it cannot continue their struggle without danger to the community. But it is not for judges to determine whether such conditions exist, nor is it their function to set the limits of permissible contest and to declare the duties which the new situation demands. This is the function of the legislature which, while limiting individual and group rights of aggression and defense, may substitute processes of justice for the more primitive method of trial by combat.”

Unions are powers within the State. Like the power of industrial and financial aggregations, the power of organized labor springs from a group which is only a fraction of the whole that Mr. Justice Holmes referred to as “the one club to which we all belong.” The power of the former is subject to control, though, of course, the particular incidence of control may be brought to test at the bar of this Court. . . . Neither can the latter claim constitutional exemption. Even the Government—the organ of the whole people—is restricted by the system of checks and balances established by our Constitution. The designers of that system distributed authority among the three branches “not to promote efficiency but to preclude the exercise of arbitrary power.” Mr. Justice Brandeis, dissenting in *Myers v. United States*, 272 U.S. 52, 293. Their concern for individual members of society, for whose well-being government is instituted, gave urgency to the fear that concentrated power would become arbitrary. It is a fear that the history of such power, even



when professedly employed for democratic purposes, has hardly rendered unfounded.

If concern for the individual justifies incorporating in the Constitution itself devices to curb public authority, a legislative judgment that his protection requires the regulation of the private power of unions cannot be dismissed as insupportable. A union is no more than a medium through which individuals are able to act together; union power was begotten of individual helplessness. But that power can come into being only when, and continue to exist only so long as, individual aims are seen to be shared in common with the other members of the group. There is a natural emphasis, however, on what is shared and a resulting tendency to subordinate the inconsistent interests and impulses of individuals. From this, it is an easy transition to thinking of the union as an entity having rights and purposes of its own. An ardent supporter of trade unions who is also no less a disinterested student of society has pointed out that "As soon as we personify the idea, whether it is a country or a church, a trade union or an employers' association, we obscure individual responsibility by transferring emotional loyalties to a fictitious creation which then acts upon us psychologically as an obstruction, especially in times of crisis, to the critical exercise of a reasoned judgment." Laski, *Morris Cohen's Approach to Legal Philosophy*, 15 U. of Chi. L. Rev. 575, 581 (1948).

The right of association, like any other right carried to its extreme, encounters limiting principles. . . . At the point where the mutual advantage of association demands too much individual disadvantage, a compromise must be struck. . . . When that point has been reached—where the intersection should fall—is plainly a question within the special province of the legislature. This Court has given effect to such a compromise in sustaining a legislative purpose to protect individual employees against the exclusionary practices of unions. . . . The rationale of the Arizona, Nebraska, and North Carolina legislation prohibiting union-security agreements is founded on a similar resolution of conflicting interests. (\*) Unless we are to treat as unconstitutional what goes against the grain because it offends what we may strongly believe to be socially desirable, that resolution must be given respect.

It is urged that the compromise which this legislation embodies is no compromise at all because fatal to the survival of organized

labor. But can it be said that the legislators and the people of Arizona, Nebraska, and North Carolina could not in reason be sceptical of organized labor's insistence upon the necessity to its strength of power to compel rather than to persuade the allegiance of its reluctant members? In the past fifty years the total number of employed, counting salaried workers and the self-employed but not farmers or farm laborers, has not quite trebled, while total union membership has increased more than thirty-three times; at the time of the open-shop drive following the First World War, the ratio of organized to unorganized non-agricultural workers was about one to nine, and now it is almost one to three. (\*) However necessitous may have been the circumstances of unionism in 1898 or even in 1923, its status in 1948 precludes constitutional condemnation of a legislative judgment, whatever we may think of it, that the need of this type of regulation outweighs its detriments. It would be arbitrary for this Court to deny the States the right to experiment with such laws, especially in view of the fact that the Railroad Brotherhoods have held their own despite congressional prohibition of union security (\*) and in the light of the experience of countries advanced in industrial democracy, such as Great Britain and Sweden, where deeply rooted acceptance of the principles of collective bargaining is not reflected in uncompromising demands for contractually guaranteed security. (\*) Whether it is preferable in the public interest that trade unions should be subjected to State intervention or left to the free play of social forces, whether experience has disclosed "union unfair labor practices" and, if so, whether legislative correction is more appropriate than self-discipline and the pressure of public opinion—these are questions on which it is not for us to express views. The very limited function of this Court is discharged when we recognize that these issues are not so unrelated to the experience and feelings of the community as to render legislation addressing itself to them wilfully destructive of cherished rights. For these are not matters, like censorship of the press or separation of Church and State, on which history, through the Constitution, speaks so decisively as to forbid legislative experimentation.

But the policy which finds expression in the prohibition of union-security agreements need not rest solely on a legislative conception of the public interest which includes but transcends the special

claims of trade unions. The States are entitled to give weight to views combining opposition to the "closed shop" with long-range concern for the welfare of trade unions. Mr. Justice Brandeis, for example, before he came to this Court, had been a staunch promoter of unionism. In testifying before the Commission on Industrial Relations, he said:

"I should say to those employers who stand for the open shop, that they ought to recognize that it is for their interests as well as that of the community that unions should be powerful and responsible; that it is to their interests to build up the union; to aid as far as they can in making them stronger; and to create conditions under which the unions shall be led by the ablest and most experienced men."(\*)

Yet at the same time he believed that "The objections, legal, economic, and social, against the closed shop are so strong, and the ideas of the closed shop so antagonistic to the American spirit, that the insistence upon it has been a serious obstacle to union progress." Letter of Sept. 6, 1910, to Lawrence F. Abbott of the *Outlook*.(\*) On another occasion he wrote, "But the American people should not, and will not, accept unionism if it involves the closed shop. They will not consent to the exchange of the tyranny of the employer for the tyranny of the employee." Letter of Feb. 26, 1912, to Lincoln Steffens.(\*) In summing up his views on unionism, he said:

"It is not true that the 'success of a labor union' necessarily means a 'perfect monopoly.' The union, in order to attain or preserve for its members industrial liberty, must be strong and stable. It need not include every member of the trade. Indeed, it is desirable for both the employer and the union that it should not. Absolute power leads to excesses and to weakness: Neither our character nor our intelligence can long bear the strain of unrestricted power. The union attains success when it reaches the ideal condition, and the ideal condition for a union is to be strong and stable, and yet to have in the trade outside its own ranks an appreciable number of men who are non-unionists. In any free community the diversity of character, of beliefs, of taste—indeed mere selfishness—will insure such a supply, if the enjoyment of

this privilege of individualism is protected by law. Such a nucleus of unorganized labor will check oppression by the union as the union checks oppression by the employer." Quoted from Louis D. Brandeis' contribution to a discussion entitled *Peace with Liberty and Justice* in 2 Nat. Civic Federation Rev., No. 2, pp. 1, 16 (May 15, 1905).

Mr. Brandeis on the long view deemed the preferential shop a more reliable form of security both for unions and for society than the closed shop; that he did so only serves to prove that these are pragmatic issues not appropriate for dogmatic solution.

Whatever one may think of Mr. Brandeis' views, they have been reinforced by the adoption of laws insuring against that undercutting of union standards which was one of the most serious effects of a dissident minority in a union shop. Under interpretations of the National Labor Relations Act undisturbed by the Taft-Hartley Act, (\*) and of the Railway Labor Act, the bargaining representative designated by a majority of employees has exclusive power to deal with the employer on matters of wages and working conditions. Individual contracts, whether on more or less favorable terms than those obtained by the union, are barred. . . . Under these laws, a non-union bidder for a job in a union shop cannot, if he would, undercut the union standards.

Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a court debilitates popular democratic government. Most laws dealing with economic and social problems are matters of trial and error. (\*) That which before trial appears to be demonstrably bad may belie prophecy in actual operation. It may not prove good, but it may prove innocuous. But even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed than that the law should be aborted by judicial fiat. Such an assertion of judicial power deflects responsibility from those on whom in a democratic society it ultimately rests—the people. If the proponents of union-security agreements have confidence in the arguments addressed to the Court in their "economic brief," they should address those arguments to the electorate. Its endorsement would be a vindication that the mandate of this Court could never give. That such vindication is not a vain hope has been recently demonstrated by the voters of

Maine, Massachusetts, and New Mexico. (\*) And although several States in addition to those at bar now have such laws, (\*) the legislatures of as many other States have, sometimes repeatedly, rejected them. (\*) What one State can refuse to do, another can undo.

But there is reason for judicial restraint in matters of policy deeper than the value of experiment: it is founded on a recognition of the gulf of difference between sustaining and nullifying legislation. This difference is theoretical in that the function of legislating is for legislatures who have also taken oaths to support the Constitution, while the function of courts, when legislation is challenged, is merely to make sure that the legislature has exercised an allowable judgment, and not to exercise their own judgment, whether a policy is within or without "the vague contours" of due process. Theory is reinforced by the notorious fact that lawyers predominate in American legislatures. (\*) In practice also the difference is wide. In the day-to-day working of our democracy it is vital that the power of the non-democratic organ of our Government be exercised with rigorous self-restraint. Because the powers exercised by this Court are inherently oligarchic, Jefferson all of his life thought of the Court as "an irresponsible body" (\*) and "independent of the nation itself." (\*) The Court is not saved from being oligarchic because it professes to act in the service of humane ends. As history amply proves, the judiciary is prone to misconceive the public good by confounding private notions with constitutional requirements, and such misconceptions are not subject to legitimate displacement by the will of the people except at too slow a pace. (\*) Judges appointed for life whose decisions run counter to prevailing opinion cannot be voted out of office and supplanted by men of views more consonant with it. They are even farther removed from democratic pressures by the fact that their deliberations are in secret and remain beyond disclosure either by periodic reports or by such a modern device for securing responsibility to the electorate as the "press conference." But a democracy need not rely on the courts to save it from its own unwisdom. If it is alert—and without alertness by the people there can be no enduring democracy—unwise or unfair legislation can readily be removed from the statute books. It is by such vigilance over its representatives that democracy proves itself.

Our right to pass on the validity of legislation is now too much

part of our constitutional system to be brought into question. But the implications of that right and the conditions for its exercise must constantly be kept in mind and vigorously observed. Because the Court is without power to shape measures for dealing with the problems of society but has merely the power of negation over measures shaped by others, the indispensable judicial requisite is intellectual humility, and such humility presupposes complete disinterestedness. And so, in the end, it is right that the Court should be indifferent to public temper and popular wishes. Mr. Dooley's "th' Supreme Coort follows th' iliction returns" expressed the wit of cynicism, not the demand of principle. A court which yields to the popular will thereby licenses itself to practice despotism, for there can be no assurance that it will not on another occasion indulge its own will. Courts can fulfill their responsibility in a democratic society only to the extent that they succeed in shaping their judgments by rational standards, and rational standards are both impersonal and communicable. Matters of policy, however, are by definition matters which demand the resolution of conflicts of value, and the elements of conflicting values are largely imponderable. Assessment of their competing worth involves differences of feeling; it is also an exercise in prophecy. Obviously the proper forum for mediating a clash of feelings and rendering a prophetic judgment is the body chosen for those purposes by the people. Its functions can be assumed by this Court only in disregard of the historic limits of the Constitution.

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PROBLEMS OF FEDERALISM

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MARSHALL'S "SEDUCTIVE CLICHÉ"

*Graves v. New York ex rel. O'Keefe*

306 U.S. 466, 487 (1939)

A month after coming to the Court, Mr. Justice Frankfurter joined in the repudiation of one of the oldest doctrines in the arsenal of judicially developed requirements of our federalism. In the course of justifying the rule that the states were without power to tax the operations of federal instrumentalities, Chief Justice Marshall had observed in *McCulloch v. Maryland*—decided in 1819—that “the power to tax involves the power to destroy.” Building on this generalization, the Court held in 1842 that the salaries of federal officials were immune from state taxation and in 1871 that the compensation of state functionaries could not be taxed by Congress. Thus, a principle which began life as a weapon for the protection of one government against possible interference with its activities by the other came in time to benefit only private income.

Over the objection of Justices Butler and McReynolds, the Supreme Court in the *O'Keefe* case at last swept aside these reciprocal tax immunities for official salaries. (*O'Keefe*, an attorney for the Home Owners Loan Corporation, questioned the right of New York to tax his salary as a federal employee.) Mr. Justice Stone, himself a leader in the movement to secure more realistic application of the doctrine of tax immunity, wrote the opinion of the Court, saying at one point, “The theory . . . that a tax on income is legally or economically a tax on its source is no longer tenable.”

Mr. Justice Frankfurter agreed with all that Justice Stone had written, but filed a brief concurring opinion to voice his views on two matters. He deplored the way in which the doctrine of intergovernmental tax

immunity had been put to purposes never intended by Marshall and pointed out that this distortion illustrates how judicial commentary on constitutional provisions had supplanted the Constitution itself:

I join in the Court's opinion but deem it appropriate to add a few remarks. The volume of the Court's business has long since made impossible the early healthy practice whereby the Justices gave expression to individual opinions. (\*) But the old tradition still has relevance when an important shift in constitutional doctrine is announced after a reconstruction in the membership of the Court. Such shifts of opinion should not derive from mere private judgment. They must be duly mindful of the necessary demands of continuity in civilized society. A reversal of a long current of decisions can be justified only if rooted in the Constitution itself as an historic document designed for a developing nation.

For one hundred and twenty years this Court has been concerned with claims of immunity from taxes imposed by one authority in our dual system of government because of the taxpayer's relation to the other. The basis for the Court's intervention in this field has not been any explicit provision of the Constitution. The States, after they formed the Union, continued to have the same range of taxing power which they had before, barring only duties affecting exports, imports, and on tonnage. (\*) Congress, on the other hand, to lay taxes in order "to pay the Debts and provide for the common Defense and general Welfare of the United States," Art. I, §8, can reach every person and every dollar in the land with due regard to Constitutional limitations as to the method of laying taxes. But, as is true of other great activities of the state and national governments, the fact that we are a federalism raises problems regarding these vital powers of taxation. Since two governments have authority within the same territory, neither through its power to tax can be allowed to cripple the operations of the other. Therefore state and federal governments must avoid exactions which discriminate against each other or obviously interfere with one another's operations. These were the determining considerations that led the great Chief Justice to strike down the Maryland statute as an unambiguous measure of discrimination against the use by the United States of the Bank of the United States as one of its instruments of government.

The arguments upon which *McCulloch v. Maryland*, 4 Wheat.



316, rested had their roots in actuality. But they have been distorted by sterile refinements unrelated to affairs. These refinements derived authority from an unfortunate remark in the opinion in *McCulloch v. Maryland*. Partly as a flourish of rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes, Chief Justice Marshall gave currency to the phrase that "the power to tax involves the power to destroy." . . . This dictum was treated as though it were a constitutional mandate. But not without protest. One of the most trenchant minds on the Marshall court, Justice William Johnson, early analyzed the dangerous inroads upon the political freedom of the States and the Union within their respective orbits resulting from a doctrinaire application of the generalities uttered in the course of the opinion in *McCulloch v. Maryland*.(\*) The seductive *cliché* that the power to tax involves the power to destroy was fused with another assumption, likewise not to be found in the Constitution itself, namely the doctrine that the immunities are correlative—because the existence of the national government implies immunities from state taxation, the existence of state governments implies equivalent immunities from federal taxation. When this doctrine was first applied Mr. Justice Bradley registered a powerful dissent,(\*) the force of which gathered rather than lost strength with time. *Collector v. Day*, 11 Wall. 113, 128.

All these doctrines of intergovernmental immunity have until recently been moving in the realm of what Lincoln called "pernicious abstractions." The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes's pen: "The power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co. v. Mississippi*, 277 U.S. 218, 223 (dissent). Failure to exempt public functionaries from the universal duties of citizenship to pay for the costs of government was hypothetically transmuted into hostile action of one government against the other. A succession of decisions thereby withdrew from the taxing power of the States and Nation a very considerable range of wealth without regard to the actual workings of our federalism,(\*) and this, too, when the financial needs of all governments began steadily to mount. These decisions have encountered increasing dissent.(\*) In view of the powerful pull of our decisions upon the courts charged with maintaining the constitutional equilibrium of the two other great English federalisms, the Canadian and the Australian courts were at first inclined to follow the earlier doctrines

of this Court regarding intergovernmental immunity. (\*) Both the Supreme Court of Canada and the High Court of Australia on fuller consideration—and for present purposes the British North America Act . . . and the Commonwealth of Australia Constitution Act . . . raise the same legal issues as does our Constitution (\*)—have completely rejected the doctrine of intergovernmental immunity. (\*) In this Court dissents have gradually become majority opinions, and even before the present decision the rationale of the doctrine had been undermined. (\*)

The judicial history of this doctrine of immunity is a striking illustration of an occasional tendency to encrust unwarranted interpretations upon the Constitution and thereafter to consider merely what has been judicially said about the Constitution, rather than to be primarily controlled by a fair conception of the Constitution. Judicial exegesis is unavoidable with reference to an organic act like our Constitution, drawn in many particulars with purposed vagueness so as to leave room for the unfolding future. But the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it. (\*) . . .

“THE CONSTITUTIONAL POWER OF THE UNITED STATES OVER  
STATE ACTIVITIES”

*New York v. United States*

326 U.S. 572 (1946)

Justice Frankfurter's opinion in this case announced the Court's judgment that the State of New York, in the sale of the mineral waters taken from Saratoga Springs, owned and operated by it, was not immune from the federal tax on mineral waters. Although six members of the Court voted to sustain the tax as applied to New York, only Justice Rutledge supported Justice Frankfurter's views, except that he thought that it might be desirable to have Congress indicate explicitly its intention to have a particular excise tax assessed also against activities directly engaged in by the states.

Chief Justice Stone in a concurring opinion stated that he and Justices Reed, Murphy, and Burton were not “prepared to say that the national government may constitutionally lay a non-discriminatory tax on every class of property and activities of states and individuals alike.” They feared that in some circumstances even a federal tax which was not

discriminatory might "so affect the State, merely because it is a State that is being taxed, as to interfere unduly with the State's performance of its sovereign functions of government." All this was said in protest against the sweeping assertion by Justice Frankfurter: "So long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State."

All six Justices repudiated, however, the distinction between "proprietary" and "governmental" functions on which the prior cases upholding federal taxation of state-operated enterprises had been based. In the leading case of *South Carolina v. United States*, decided in 1905, a divided Court had held that while the activities of a state carried on in its "ordinary functions as a government" were immune from federal taxation, a state might be taxed by the national government when carrying on "an ordinary private business." 199 U.S. 437. It upheld a federal license tax on the sale of liquor by state-operated dispensaries.

After observing that the Court saw no reason for placing "soft drinks in a different constitutional category from hard drinks," Justice Frankfurter proceeded to reject the theory of the *South Carolina* case: "To rest the federal taxing power on what is 'normally' conducted by private enterprise in contradiction to the 'usual' governmental functions is too shifting a basis for determining constitutional power and too entangled in expediency to serve as a dependable legal criterion." New York was seeking immunity from the federal tax by arguing that in the bottling and sale of the mineral waters it was exercising "a usual, traditional and essential governmental function."

Justices Black and Douglas dissented, calling on the Court to forget precedent and to overrule *South Carolina v. United States* and the related cases. They were opposed to the doctrine permitting federal taxation of state-owned businesses, partly because of a constitutional objection and partly out of concern for its practical results for the states and their political subdivisions. They thought that the doctrine "disregards the Tenth Amendment, places the sovereign States upon the same plane as private citizens, and makes the sovereign States pay the federal government for the privilege of exercising the powers of sovereignty guaranteed them by the Constitution." The mere fact that a state or locality enters an activity also engaged in by private persons does not put the government in the same class with the private entrepreneur. Justice Douglas expressed the fear that since the states often undertake projects in which private investors are not interested, subjecting them to federal taxation might well make their cost to the states prohibitive. He observed: "A

State's project is as much a legitimate governmental activity whether it is traditional, or akin to private enterprise, or conducted for profit."

Mr. Justice Frankfurter's opinion read in part:

. . . . .

On the basis of authority the case is quickly disposed of. When States sought to control the liquor traffic by going into the liquor business, they were denied immunity from federal taxes upon the liquor business. *South Carolina v. United States*, 199 U.S. 437; *Ohio v. Helvering*, 292 U.S. 360. And in rejecting a claim of immunity from federal taxation when Massachusetts took over the street railways of Boston, this Court a decade ago said: "We see no reason for putting the operation of a street railway [by a State] in a different category from the sale of liquors." *Helvering v. Powers*, 293 U.S. 214, 227. We certainly see no reason for putting soft drinks in a different constitutional category from hard drinks. . . .

One of the greatest sources of strength of our law is that it adjudicates concrete cases and does not pronounce principles in the abstract. But there comes a time when even the process of empiric adjudication calls for a more rational disposition than that the immediate case is not different from preceding cases. The argument pressed by New York and the forty-five other States who, as amici curiae, have joined her deserves an answer.

Enactments levying taxes made in pursuance of the Constitution are, as other laws are, "the supreme Law of the Land." . . . The first of the powers conferred upon Congress is the power "To lay and collect Taxes, Duties, Imposts and Excises . . ." . . . By its terms the Constitution has placed only one limitation upon this power, other than limitations upon methods of laying taxes not here relevant: Congress can lay no tax "on Articles exported from any State." . . . Barring only exports, the power of Congress to tax "reaches every subject." . . . But the fact that ours is a federal constitutional system, as expressly recognized in the Tenth Amendment, carries with it implications regarding the taxing power as in other aspects of government. . . . Thus, for Congress to tax State activities while leaving untaxed the same activities pursued by private persons would do violence to the presuppositions derived from the fact that we are a Nation composed of States.

But the fear that one government may cripple or obstruct the

operations of the other early led to the assumption that there was a reciprocal immunity of the instrumentalities of each from taxation by the other. It was assumed that there was an equivalence in the implications of taxation by a State of the governmental activities of the National Government and the taxation by the National Government of State instrumentalities. This assumed equivalence was nourished by the phrase of Chief Justice Marshall that "the power to tax involves the power to destroy." . . . To be sure, it was uttered in connection with a tax of Maryland which plainly discriminated against the use by the United States of the Bank of the United States as one of its instruments. What he said may not have been irrelevant in its setting. But Chief Justice Marshall spoke at a time when social complexities did not so clearly reveal as now the practical limitations of a rhetorical absolute. . . . The phrase was seized upon as the basis of a broad doctrine of intergovernmental immunity, while at the same time an expansive scope was given to what were deemed to be "instrumentalities of government" for purposes of tax immunity. As a result, immunity was until recently accorded to all officers of one government from taxation by the other, and it was further assumed that the economic burden of a tax on any interest derived from a government imposes a burden on that government so as to involve an interference by the taxing government with the functioning of the other government. . . .

To press a juristic principle designed for the practical affairs of government to abstract extremes is neither sound logic nor good sense. And this Court is under no duty to make law less than sound logic and good sense. When this Court for the first time relieved State officers from a non-discriminatory Congressional tax, not because of anything said in the Constitution but because of the supposed implications of our federal system, Mr. Justice Bradley pointed out the invalidity of the notion of reciprocal intergovernmental immunity. The considerations bearing upon taxation by the States of activities or agencies of the federal government are not correlative with the considerations bearing upon federal taxation of State agencies or activities. The federal government is the government of all the States, and all the States share in the legislative process by which a tax of general applicability is laid. "The taxation by the State governments of the instruments employed by the general government in the exercise of its powers," said Mr. Justice

Bradley, "is a very different thing. Such taxation involves an interference with the powers of a government in which other States and their citizens are equally interested with the State which imposes the taxation." (\*) Since then we have moved away from the theoretical assumption that the National Government is burdened if its functionaries, like other citizens, pay for the upkeep of their State governments, and we have denied the implied constitutional immunity of federal officials from State taxes. . . .

In the meantime, cases came here, as we have already noted, in which States claimed immunity from a federal tax imposed generally on enterprises in which the State itself was also engaged. This problem did not arise before the present century, partly because State trading did not actively emerge until relatively recently, and partly because of the narrow scope of federal taxation. In *South Carolina v. United States*, 199 U.S. 437, immunity from a federal tax on a dispensary system, whereby South Carolina monopolized the sale of intoxicating liquors, was denied by drawing a line between taxation of the historically recognized governmental functions of a State, and business engaged in by a State of a kind which theretofore had been pursued by private enterprise. The power of the federal government thus to tax a liquor business conducted by the State was derived from an appeal to the Constitution "in the light of conditions surrounding at the time of its adoption." . . . That there is a constitutional line between the State as government and the State as trader, was still more recently made the basis of a decision sustaining a liquor tax against Ohio. *Ohio v. Helvering*, supra, at 369. It could hardly remain a satisfactory constitutional doctrine that only such State activities are immune from federal taxation as were engaged in by the States in 1787. Such a static concept of government denies its essential nature. "The science of government is the most abstruse of all sciences; if, indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment." *Anderson v. Dunn*, 6 Wheat. 204, 226.

When this Court came to sustain the federal taxing power upon a transportation system operated by a State it did so in ways familiar in developing the law from precedent to precedent. It edged away from reliance on a sharp distinction between the "govern-

mental" and the "trading" activities of a State, by denying immunity from federal taxation to a State when it "is undertaking a business enterprise of a sort that is normally within the reach of the federal taxing power and is distinct from the usual governmental functions that are immune from federal taxation in order to safeguard the necessary independence of the State." *Helvering v. Powers*, supra, at 227. But this likewise does not furnish a satisfactory guide for dealing with such a practical problem as the constitutional power of the United States over State activities. To rest the federal taxing power on what is "normally" conducted by private enterprise in contradiction to the "usual" governmental functions is too shifting a basis for determining constitutional power and too entangled in expediency to serve as a dependable legal criterion. The essential nature of the problem cannot be hidden by an attempt to separate manifestations of indivisible governmental powers. . . .

The present case illustrates the sterility of such an attempt. (\*) New York urges that in the use it is making of Saratoga Springs it is engaged in the disposition of its natural resources. And so it is. But in doing so it is engaged in an enterprise in which the State sells mineral waters in competition with private waters, the sale of which Congress has found necessary to tap as a source of revenue for carrying on the National Government. To say that the States cannot be taxed for enterprises generally pursued, like the sale of mineral water, because it is somewhat connected with a State's conservation policy, is to invoke an irrelevance to the federal taxing power. Liquor control by a State certainly concerns the most important of a State's natural resources—the health and well-being of its people. . . . If in its wisdom a State engages in the liquor business and may be taxed by Congress as others engaged in the liquor business are taxed, so also Congress may tax the States when they go into the business of bottling water as others in the mineral water business are taxed even though a State's sale of its mineral waters has relation to its conservation policy.

In the older cases, the emphasis was on immunity from taxation. The whole tendency of recent cases reveals a shift in emphasis to that of limitation upon immunity. They also indicate an awareness of the limited role of courts in assessing the relative weight of the factors upon which immunity is based. Any implied limitation upon the supremacy of the federal power to levy a tax like that now be-

fore us, in the absence of discrimination against State activities, brings fiscal and political factors into play. The problem cannot escape issues that do not lend themselves to judgment by criteria and methods of reasoning that are within the professional training and special competence of judges. Indeed the claim of implied immunity by States from federal taxation raises questions not wholly unlike provisions of the Constitution, such as that of Art. IV, §4, guaranteeing States a republican form of government . . . which this Court has deemed not within its duty to adjudicate.

. . . There are, of course, State activities and State-owned property that partake of uniqueness from the point of view of intergovernmental relations. These inherently constitute a class by themselves. Only a State can own a Statehouse; only a State can get income by taxing. These could not be included for purposes of federal taxation in any abstract category of taxpayers without taxing the State as a State. But so long as Congress generally taps a source of revenue by whomsoever earned and not uniquely capable of being earned only by a State, the Constitution of the United States does not forbid it merely because its incidence falls also on a State. If Congress desires, it may of course leave untaxed enterprises pursued by States for the public good while it taxes like enterprises organized for private ends. . . . If Congress makes no such differentiation and, as in this case, taxes all vendors of mineral water alike, whether State vendors or private vendors, it simply says, in effect, to a State: "You may carry out your own notions of social policy in engaging in what is called business, but you must pay your share in having a nation which enables you to pursue your policy." After all, the representatives of all the States, having, as the appearance of the Attorneys General of forty-six States at the bar of this Court shows, common interests, alone can pass such a taxing measure and they alone in their wisdom can grant or withhold immunity from federal taxation of such State activities.

The process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency. Nor need we go beyond what is required for a reasoned disposition of the kind of controversy now before the Court. The restriction upon States not to make laws that discriminate against interstate commerce is a vital constitutional principle, even though "discrimination" is not a code of specifics



but a continuous process of application. So we decide enough when we reject limitations upon the taxing power of Congress derived from such untenable criteria as "proprietary" against "governmental" activities of the States, or historically sanctioned activities of government, or activities conducted merely for profit, (\*) and find no restriction upon Congress to include the States in levying a tax exacted equally from private persons upon the same subject matter.

LABOR RELATIONS AND "THE OPERATION OF ECONOMIC FORCES  
ACROSS STATE LINES"

*Polish National Alliance v. National Labor Relations Board*

322 U.S. 643 (1944)

Argued early in January of 1944, this case was not decided until five months later. The delay was no doubt due to the desire of the Justices to dispose first of a much more troublesome and seemingly related case argued at the same time. *United States v. South-Eastern Underwriters Association*—322 U.S. 533—was the other case. Originating with the indictment of some two hundred fire insurance companies and twenty-seven individuals charged with violation of the Sherman Anti-Trust Act, this important case called on the Court to decide, for the first time in its history, whether "the commerce clause grants to Congress the power to regulate insurance transactions stretching across state lines." Standing in the way of agreement among the Justices was the assertion in the leading case of *Paul v. Virginia*—8 Wall. 168 (1869)—that "the business of insurance is not commerce."

Four of the seven Justices who sat in the *South-Eastern Underwriters* case refused to be bound by *Paul v. Virginia*. (Justices Roberts and Reed did not participate in the case.) Supported by Justices Douglas, Murphy, and Rutledge, Mr. Justice Black delivered the opinion of the Court, elaborately explaining the two major aspects of the decision. His opinion held first that when insurance companies transact a substantial part of their business across state lines, they are engaging in interstate commerce and are hence subject to regulation by Congress under the commerce clause. The majority ruled, in the second place—and this is what evoked the sharp dissents—that Congress did not intend to exclude the business of insurance from the operation of the Sherman Anti-Trust Act.

Chief Justice Stone, Mr. Justice Frankfurter and Mr. Justice Jackson

each wrote a dissenting opinion, contending in the main that while many of the activities carried on by insurance companies constitute interstate commerce subject to the federal commerce power, Congress did not intend to apply the Sherman Act to the business of insurance. As the Chief Justice said, "It would be strange, indeed, if Congress, in adopting the Sherman Act in 1890, more than twenty years after this Court had supposedly settled the question, had considered that the business of insurance was interstate commerce or had contemplated that the Sherman Act was to apply to it." What particularly worried the minority were the dislocations which they feared would follow from the action of the Court in transferring the business of insurance from state to federal control in the absence of legislation by Congress.

That the dissenters in the South-Eastern Underwriters case appreciated fully that some phases of the business of insurance are subject to regulation by the federal government is clearly demonstrated by the decision in the Polish National Alliance case. As Justice Frankfurter observed, apropos of a different phase of the controversy, "Constitutional questions that look alike often are altogether different and call for different answers." Without a dissenting vote, the Court held that the Alliance, a fraternal benefit society providing death, disability and accident benefits to its members, was engaged in interstate commerce and therefore subject to the provisions of the National Labor Relations Act. The many diversified activities in which the Alliance engages and which bring it under the jurisdiction of the Labor Board are set forth in detail in Mr. Justice Frankfurter's opinion for the Court:

The National Labor Relations Board, having found that petitioner, in violation of the National Labor Relations Act, had engaged in unfair labor practices, issued an order of cessation against it. . . . the Circuit Court of Appeals for the Seventh Circuit sustained the order. . . . Of the numerous issues before that court only two are open here, the importance of which led us to grant certiorari. . . . The questions are these: (1) In view of the petitioner's activities, is the conduct found by the Board to constitute unfair labor practices within the scope of the National Labor Relations Act; (2) if Congress has proscribed such conduct, has it exceeded its power to regulate commerce among the several States?

The Polish National Alliance is a fraternal benefit society providing death, disability, and accident benefits to its members and their beneficiaries. Incorporated under the laws of Illinois, it is organized into 1,817 lodges scattered through twenty-seven States,

the District of Columbia, and the Province of Manitoba, Canada. As the "largest fraternal organization in the world of Americans of Polish descent," it had outstanding, in 1941, 272,897 insurance benefit certificates with a face value of nearly \$160,000,000. Over 76% of these certificates were held by persons living outside of Illinois. At the end of that year, petitioner's assets totalled about \$30,000,000, in cash, real estate in five States, United States Government bonds, foreign government bonds, bonds of various States and their political subdivisions, railroad, public utility, and industrial bonds, and stocks. From its organization in 1880 until the end of 1940, the Alliance spent over \$7,000,000 for charitable, educational, and fraternal activities among its members. During the same period, it paid out over \$38,000,000 in "mortuary claims."

Petitioner directs from its home office in Chicago a staff of over 225 full and part-time organizers and field agents in twenty-six States whose traveling expenses are borne by Alliance and who receive commissions for new memberships. Since its 1939 convention, Alliance has admitted no more "social members." Thereafter, all applicants have been required to buy insurance certificates providing various types of life, endowment, and term coverage. These policies contain the typical loan, cash surrender value, optional settlement, and dividend provisions. Petitioner spent over \$10,000 for advertising outside of Illinois during 1941. It employs a Georgia credit company to report on the financial standing and character of the applicants, and reinsures substandard risks with an Indiana company.

Alliance lodges are organized into 190 councils, 160 of which are outside the State of Illinois. The councils elect delegates to the national convention, and it in turn elects the executive and administrative officers. The Censor of Alliance is its ranking officer and he appoints an editorial staff which publishes a weekly paper distributed to members. Of the 6,857,556 copies published in 1941, about 80% were mailed to persons living outside of Illinois.

This summary of the activities of Alliance and of the methods and facilities for their pursuit amply shows the web of money-making transactions woven across many state lines. An effective strike against such a business enterprise, centered in Chicago but radiating from it all over the country, would as a practical matter certainly burden and obstruct the means of transmission and com-

munication across these state lines. Stoppage or disruption of the work in Chicago involves interruptions in the steady stream, into and out of Illinois, of bills, notices, and policies, the payment of commissions, the making of loans on policies, the insertion and circulation of advertising material in newspapers, and its dissemination over the radio. The effect of such interruption on commerce is unmistakable. The load of interstate communication and transportation services is lessened, cash necessary for interstate business becomes unavailable, the business, interstate, of newspapers and radio stations suffer. Nor is this all. Alliance, it appears, plays a credit role in interstate industries, railroads, and other public utilities. In 1941, it acquired securities in an amount in excess of \$11,000,000, and sold or redeemed securities costing more than \$7,500,000. Financial transactions of this magnitude cannot be impeded even temporarily without affecting to an extent not negligible the interstate enterprises in which the large assets of Alliance are invested. That such are the substantial effects on interstate commerce of dislocating labor practices by insurance companies, was established before the Labor Board in at least thirteen comparable situations. (\*) The practical justification of such a conclusion has not heretofore been challenged. Considerations like these led the Board to find that petitioner's practices "have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce," and were therefore "unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7)," and as such, prohibited by §10 of the Wagner Act.

By that Act, Congress in order to protect interstate commerce from adverse effects of labor disputes has undertaken to regulate all conduct having such consequences that constitutionally it can regulate. . . . With negligible exceptions, Congress did not exercise its power to regulate commerce prior to its enactment in 1887 of the Interstate Commerce Act. . . . Since that time it has frequently chosen, as the Statutes at Large abundantly prove, to regulate only part of what it constitutionally can regulate. Again, half a dozen enactments, other than the National Labor Relations Act, are sufficient to illustrate that when it wants to bring aspects of commerce within the full sweep of its constitutional authority, it manifests its purpose by regulating not only "commerce" but also matters which

"affect," "interrupt," or "promote" interstate commerce. . . . In so describing the range of its control, Congress is not indulging stylistic preferences; it is mediating between federal and state authorities, and deciding what matters are to be taken over by the central Government and what to be left to the States. . . . And so in this Act, unlike some federal regulatory measures, . . . Congress has explicitly regulated not merely transactions or goods in interstate commerce but activities which in isolation might be deemed to be merely local but in the interlacings of business across state lines adversely affect such commerce. By the Wagner Act, Congress gave the Board authority to prevent practices "tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." . . . Congress therefore left it to the Board to ascertain whether proscribed practices would in particular situations adversely affect commerce when judged by the full reach of the constitutional power of Congress. Whether or no practices may be deemed by Congress to affect interstate commerce is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce. . . .

We have said enough to indicate the ground for our conclusion that the Board was not unjustified in finding that the unfair labor practices found by it would affect commerce. And the undoubted fact that Alliance promotes, among Americans of Polish descent, interest in, and devotion to, the contributions that Poland has made to civilization does not subordinate its business activities to insignificance. Accordingly, the Board could find that its cultural and fraternal activities do not withdraw Alliance from amenability to the Wagner Act.

In this aspect, the case we have before us presents a wholly new problem of the relation of federal authority to the business of insurance. The long series of insurance cases that have come to this Court for more than seventy-five years . . . have invariably involved some exercise of state power resisted, in most instances, on the claim that it was impliedly forbidden by the Commerce Clause. Such was the context in which this Court decided again and again that the making of a contract of insurance is not interstate com-

merce and that, since the business of insurance is in effect merely a congeries of contracts, the States may, for taxing and diverse other purposes, regulate the making of such contracts and the insurance business free from the limitations imposed upon state action by the Commerce Clause. Constitutional questions that look alike often are altogether different and call for different answers because they bring into play different provisions of the Constitution or different exertions of power under it. Thus, federal regulation does not preclude state taxation, and state taxation does not preclude federal regulation. . . .

We have, therefore, now presented for the first time not an exercise of state but of national power in relation to the insurance business. And so the ultimate question is whether, in view of the relation between the activities of the insurance business before us and the operation of economic forces across state lines, the Constitution denies to Congress the power to say that the interplay of the insurance business and those economic forces is such that its power "to regulate Commerce . . . among the several States" carries with it the power to regulate the conduct here regulated by relevant legislation.

The process of adjusting the interacting areas of national and state authority over commerce has been reflected in hundreds of cases from the very beginning of our history. Precisely the same kind of issues has plagued the two great English-speaking federations, the constitutions of which similarly distribute legislative power over business between central and subordinate governments. . . . These are difficulties inherent in such a federal constitutional system.

The interpenetrations of modern society have not wiped out state lines. It is not for us to make inroads upon our federal system either by indifference to its maintenance or excessive regard for the unifying forces of modern technology. Scholastic reasoning may prove that no activity is isolated within the boundaries of a single State, but that cannot justify absorption of legislative power by the United States over every activity. On the other hand, the old admonition never becomes stale that this Court is concerned with the bounds of legal power and not with the bounds of wisdom in its exercise by Congress. When the conduct of an enterprise affects commerce among the States is a matter of practical judgment, not to be de-

terminated by abstract notions. The exercise of this practical judgment the Constitution entrusts primarily and very largely to the Congress, subject to the latter's control by the electorate. Great power was thus given to the Congress: the power of legislation and thereby the power of passing judgment upon the needs of a complex society. Strictly confined though far-reaching power was given to this Court: that of determining whether the Congress has exceeded limits allowable in reason for the judgment which it has exercised. To hold that Congress could not deem the activities here in question to affect what men of practical affairs would call commerce, and to deem them related to such commerce merely by gossamer threads and not by solid ties, would be to disrespect the judgment that is open to men who have the constitutional power and responsibility to legislate for the Nation.

. . . . .

THE FAIR LABOR STANDARDS ACT AND "PREDOMINANTLY  
LOCAL SITUATIONS"

*10 East 40th Street Building, Inc. v. Callus*

325 U.S. 578 (1945)

Without dissent, the Supreme Court in 1941 sustained the constitutionality of the Fair Labor Standards Act of 1938. (*United States v. Darby*, 312 U.S. 100; *Opp Cotton Mills v. Administrator*, 312 U.S. 126.) Justice Stone's opinions in these cases vindicated in exceedingly generous terms Congress' power to enact wage and hour legislation for American industry. It was to be expected, however, that differences would develop as cases arose testing whether the law applied to particular types of industrial situations.

Section 6 of the Fair Labor Standards Act requires an employer to pay prescribed minimum wages "to each of his employees who is engaged in commerce or in the production of goods for commerce." Section 3 (j) reads: "For the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed . . . in any process or occupation necessary to the production thereof, in any State."

A decision of far-reaching importance involving the scope of these

sections was handed down in 1942, in *A. B. Kirschbaum Co. v. Walling*, 316 U.S. 517, decided together with *Arsenal Building Corp. v. Walling*. Justice Frankfurter wrote the Court's opinion, which held that the Fair Labor Standards Act applied to the maintenance employees—engineers, firemen, electricians, elevator operators, watchmen, porters, carpenters—of buildings whose tenants were engaged in manufacturing clothing for interstate markets. Justice Frankfurter stressed that it is not necessary that employees be engaged in the actual physical processes by which goods are manufactured: "Without light and heat and power the tenants could not engage, as they do, in the production of goods for interstate commerce. The maintenance of a safe, habitable building is indispensable to that activity."

Exactly three years later, a bare majority of the Court reached an opposite result, and again Justice Frankfurter spoke for the Tribunal. The maintenance employees of the 10 East 40th Street Building—an office building used for offices by a great variety of tenants, including some mining and manufacturing concerns—were held not to have such a close and intimate connection with the production of goods as to be covered by the Fair Labor Standards Act.

Seeing no differences between the relation of these employees to production and the relation of those involved in the *Kirschbaum* case to production. Justices Black, Reed, Murphy, and Rutledge dissented, with Justice Murphy writing an opinion which severely criticized the majority for ignoring economic realities. Pointing to the fact that approximately 26% of the rentable area of the building was occupied by the executive offices of manufacturing and mining concerns and approximately 6.5% by firms engaged in preparing and writing mimeographed, photographic and printed matter which is shipped to other states, Justice Murphy argued that "it is enough if the employees are necessary to the production of goods by tenants occupying the building in which they work." It is immaterial that none of the physical processes of manufacturing occurs in the same building: "Production requires central planning, control, supervision, purchase of raw materials, designing of products, sales promotion and the like as well as the physical, manual processes of manufacturing."

Mr. Justice Frankfurter's opinion for the Court read in part:

The Fair Labor Standards Act of 1938 regulates wages and hours not only of employees who are "engaged in commerce" but also those engaged "in the production of goods for commerce." . . . For the purposes of that Act "an employee shall be deemed to have been engaged in the production of goods if such employee was em-



ployed . . . in any process or occupation necessary to the production thereof, in any State." §3 (j). When these provisions first came here we made it abundantly clear that their enforcement would involve the courts in the empiric process of drawing lines from case to case, and inevitably nice lines. *Kirschbaum Co. v. Walling*, 316 U.S. 517. And this for two reasons. In enacting this statute Congress did not see fit, as it did in other regulatory measures, e.g., the Interstate Commerce Act and the National Labor Relations Act, to exhaust its constitutional power over commerce. And "Unlike the Interstate Commerce Act and the National Labor Relations Act and other legislation, the Fair Labor Standards Act puts upon the courts the independent responsibility of applying *ad hoc* the general terms of the statute to an infinite variety of complicated industrial situations." . . . Thus, Congress withheld from the courts the aid of constitutional criteria . . . as well as the benefit of a prior judgment, on vexing and ambiguous facts, by an expert administrative agency. . . .

The Act has produced a considerable volume of litigation and has inevitably given rise to judicial conflicts and divisions. The lower courts, and only in a lesser measure this Court, have been plagued with problems in connection with employees of buildings occupied by those having at least some relation to goods that eventually find their way into interstate commerce.

. . . . .  
 . . . Petitioner owns and manages a 48-story New York office building. The offices are leased to more than a hundred tenants pursuing a great variety of enterprises including executive and sales offices of manufacturing and mining concerns, sales agencies representing such concerns, engineering and construction firms, advertising and publicity agencies, law firms, investment and credit organizations and the United States Employment Service. The distribution of occupancy in relation to the ultimate enterprises of the different groups of tenants was the subject of conflicting testimony and interpretation, but in our view does not call for particularization. Indisputably, the building is devoted exclusively to offices, and no manufacturing is carried on within it. The respondents are maintenance employees of the building, elevator starters and operators, window cleaners, watchmen and the like. They

brought this suit under §16 (b) of the Fair Labor Standards Act for claims of overtime payment to which they are entitled if their occupations be deemed "necessary to the production" of goods for commerce. Obviously they are not "engaged in commerce." The District Court dismissed the suit. . . . The Circuit Court of Appeals reversed. . . . By a meticulous calculation, it found that the executive offices of manufacturing and mining concerns, sales agencies representing such concerns, and publicity concerns were engaged in the production of goods for interstate commerce, and, since the offices of these concerns occupied 42% of the rentable area and 48% of the rented area, the maintenance employees of the owners of the building are engaged in occupations "necessary to the production" of goods for commerce. . . .

The series of cases in which we have had to decide when employees are engaged in an "occupation necessary to the production" of goods for commerce has settled at least some matters. Merely because an occupation involves a function not indispensable to the production of goods, in the sense that it can be done without, does not exclude it from the scope of the Fair Labor Standards Act. Conversely, merely because an occupation is indispensable, in the sense of being included in the long chain of causation which brings about so complicated a result as finished goods, does not bring it within the scope of the Fair Labor Standards Act. . . . In giving a fair application to §3 (j), courts must remember that the "necessary" in the phrase "necessary to the production" of goods for commerce "is colored by the context not only of the terms of this legislation but of its implications in the relation between state and national authority." . . . We must be alert, therefore, not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation.

Renting office space in a building exclusively set aside for an unrestricted variety of office work spontaneously satisfies the common understanding of what is local business and makes the employees of such a building engaged in local business. Mere separation of an occupation from the physical process of production does not preclude application of the Fair Labor Standards Act. But remoteness of a particular occupation from the physical process is a relevant factor in drawing the line. Running an office building as an entirely independent enterprise is too many steps removed from the physical

process of the production of goods. Such remoteness is insulated from the Fair Labor Standards Act by those considerations pertinent to the federal system which led Congress not to sweep predominantly local situations within the confines of the Act. To assign the maintenance men of such an office building to the productive process because some proportion of the offices in the building may, for the time being, be offices of manufacturing enterprises is to indulge in an analysis too attenuated for appropriate regard to the regulatory power of the States which Congress saw fit to reserve to them. Dialectic inconsistencies do not weaken the validity of practical adjustments, as between the State and federal authority, when Congress has cast the duty of making them upon the courts. Our problem is not an exercise in scholastic logic.

The differences between employees of a building owned by occupants producing therein goods for commerce, and the employees of a building intended for tenants who produce such goods therein, and the employees of the office building of a large interstate producer, are too thin for the practicalities of adjudication. But an office building exclusively devoted to the purpose of housing all the usual miscellany of offices has many differences in the practical affairs of life from a manufacturing building, or the office building of a manufacturer. And the differences are too important in the setting of the Fair Labor Standards Act not to be recognized by the courts.

We have heretofore tried to indicate the nature of the nexus between employees who, though not themselves engaged in commerce, are engaged in occupations necessary for the production of goods for commerce by describing the necessary work that brings the occupation within the scope of the Act as work that had "a close and immediate tie with the process of production." . . . Doubtless more felicitous adjectives could be chosen, but the attempt to achieve a form of words that could avoid an exercise of judgment that a particular occupation is more in the nature of local business than not, is merely to be content with formulas of illusory certainty.

On the terms in which Congress drew the legislation we cannot escape the duty of drawing lines. And when lines have to be drawn they are bound to appear arbitrary when judged solely by bordering cases. To speak of drawing lines in adjudication is to express figuratively the task of keeping in mind the considerations relevant to a

problem and the duty of coming down on the side of the considerations having controlling weight. Lines are not the worse for being narrow if they are drawn on rational considerations. It is a distinction appropriate to the subject matter to hold that where occupations form part of a distinctive enterprise, such as the enterprise of running an office building, they are properly to be treated as distinct from those necessary parts of a commercial process which alone, with due regard to local regulations, Congress dealt with in the Fair Labor Standards Act. Of course an argument can be made on the other side. That is what is meant by a question of degree, as is the question before us. But for drawing the figurative line the basis must be something practically relevant to the problem in hand. We believe that is true of the line drawn in this case.

#### THE WAGNER ACT AND STATE REGULATION OF UNION ACTIVITIES

##### *Hill v. Florida*

325 U.S. 538, 547 (1945)

A 1943 Florida statute provided for the licensing of business agents and required labor unions to file annual reports and to pay an annual fee of one dollar. It set up a board consisting of the Governor, the Secretary of State and the Commissioner of Education to pass on applications for licenses. Only persons of good moral character, who had not been convicted of a felony and who had been citizens of the United States for more than ten years, could be licensed as business agents.

At the request of Florida's Attorney General, a state court issued an injunction directed against the United Association of Journeymen Plumbers and Steamfitters, Local No. 234, and Hill, its business agent. The union was enjoined from further functioning until it filed the necessary report and paid the required fee to the Secretary of State, and Hill was to refrain from acting as the union's business agent until he obtained a state license. This decree was affirmed by the Florida Supreme Court, but reversed by the United States Supreme Court in an opinion by Mr. Justice Black.

Justice Black noted first that the National Labor Relations Act does not deprive the states of all power to regulate the activities of labor unions. He recalled that in 1942 the Court held that the states were free to deal with mass picketing, threats, violence, and related aspects of labor disputes not covered by the Wagner Act, but had suggested that its

answer might be different if the state order it was considering had actually hampered employees in the enjoyment of their rights under the federal law. (*Allen-Bradley Local v. Winconsin Board*, 315 U.S. 740.) Now that the Court was confronted with state action seriously affecting the status of employees and their collective bargaining rights under the Wagner Act, it could no longer postpone decision of the question judgment on which was reserved in the *Allen-Bradley* case. And so Justice Black went on to announce for the majority that as enforced the Florida statute curtailed the "full freedom" of choice in the selection of collective bargaining agents secured by the National Labor Relations Act. While the provisions requiring reports and exacting a one-dollar annual fee were not foreclosed by the Wagner Act, the injunction against the union functioning as such was inconsistent with the federally protected process of collective bargaining. The essence of Justice Black's opinion is expressed in these few sentences:

"The declared purpose of the Wagner Act . . . is to encourage collective bargaining, and to protect the 'full freedom' of workers in the selection of bargaining representatives of their own choice. To this end Congress made it illegal for an employer to interfere with, restrain or coerce employees in selecting their representatives. Congress attached no conditions whatsoever to their freedom of choice in this respect. Their own best judgment, not that of someone else, was to be their guide. 'Full freedom' to choose an agent means freedom to pass upon the agent's qualifications."

Taking exception to practically everything Mr. Justice Black had said by way of establishing that there was an "irreconcilable conflict" between the Florida statute and the collective bargaining provisions of the Wagner Act, Mr. Justice Frankfurter wrote a vigorous dissent, concurred in by Mr. Justice Roberts. It read in part:

The Court is striking down a State law not because such a statute in and of itself is beyond the power of a State to enact. The Florida statute is nullified because, so Florida is told, Congress has barred Florida from this lawmaking, although Congress has neither expressly nor by fair inference forbidden Florida to deal with the matter with which Florida has dealt and Congress has not. Concretely, Congress by protecting employees in their right to choose representatives for collective bargaining free from the coercion or influence of employers did not impliedly wipe out the right of States under their police power to require qualifications appropriate for union officials having fiduciary duties.

It was settled early in our constitutional history that the mere fact that Congress has power to regulate commerce among the several States does not exclude State legislation in the exercise of the police power, even though it may affect such commerce, where the subject matter does not demand a nation-wide rule. . . . The States, in short, may speak on matters even in the general domain of commerce so long as Congress is silent. But when Congress has spoken, although not as fully as the Constitution authorizes, that is, when a federal enactment falls short of the Congressional power to legislate touching commerce, the States may still speak where Congress is still silent. The real question is: Has Congress spoken so as to silence the States? The same regard for the harmonious balance of our federal system, whereby the States may protect local interests despite the dormant Commerce Clause, allows State legislation for the protection of local interests so long as Congress has not supplanted local regulation either by a regulation of its own or by an unmistakable indication that there is to be no regulation at all. The relation of such enactment of local concern to federal enactments which fall short of the full reach of the Constitution raises a problem of judicial judgment similar to that presented where a State law encounters no federal statute. The problem is one of judicial accommodation between respect for the supplanting authority of Congress and the reserved police power of the States. Long ago this policy of accommodation was formulated by this Court: "We agree, that in the application of this principle of supremacy of an act of Congress in a case where the State law is but the exercise of a reserved power, the repugnance or conflict should be direct and positive, so that the two acts could not be reconciled or consistently stand together." *Sinnot v. Davenport*, 22 How. 227, 243.

. . . . .

In a great variety of cases, the Court has applied the accommodation formulated in *Sinnot v. Davenport*, *supra*, and either reasserted or reinforced that policy. The emphasis has been on recognizing that both the State law and the federal statute must be allowed to prevail if they may prevail together—that is, if they do not, as a matter of language or practical enforcement, collide, or if Congress has not manifested an unambiguous purpose that there be no regu-

lation, either State or federal, as to matters for which it has not prescribed. . . .

. . . . .

A survey of the scores of cases in which the claim has been made that State action cannot survive some contradictory command of Congress leaves no doubt that State action has not been set aside on mere generalities about Congress having "occupied the field," or on the basis of loose talk instead of demonstrations about "conflict" between State and federal action. We are in the domain of government and practical affairs, and this Court has not stifled State action, unless what the State has required, in the light of what Congress has ordered, would truly entail contradictory duties or make actual, not argumentative, inroads on what Congress has commanded or forbidden.

Since the bulk of federal regulatory legislation has until recently been concerned with the great interstate utilities, the cases dealing with the relation of State to federal legislation in this field shed most light on the question before us. Moreover, these present situations least favorable to tolerance for State legislation. The need for national control, with corresponding restriction of local regulation, is presumably most powerfully asserted where interstate transportation and communication are involved.

The range and particularity of federal legislation regulating railroads, expressed in a long series of enactments, have given rise to most of the cases in which State action has been found in conflict with federal action. . . . But merely because regulatory power is possessed by a federal agency does not displace State regulation if no federal standards are set. . . .

. . . . .

Even where the enforcement of a State statute carries international implications and thus deals with sensitive concerns peculiarly within the direction of federal authority, this Court only recently was slow to strike down an exercise of the State police power. When, in *Hines v. Davidowitz*, 312 U.S. 52, the United States strongly urged upon us that a Pennsylvania system of alien registration, established in 1939, had been superseded by the Federal Alien

Registration Act of 1940, we did not displace the State law cavalierly, on the basis of loose inference and dogmatic assertion, but examined with painstaking care the particular requirements of Pennsylvania in order to ascertain whether, in their practical operation, they ran counter to the scheme as conceived by Congress and impinged upon its administration. A detailed examination of the long course of federal legislation affecting aliens, of which the Act of 1940 was the latest in a series, led the Court to conclude that Congress had "provided a standard for alien registration in a single integrated and all-embracing system . . . through one uniform national registration system" to which Pennsylvania had to subordinate its local policy. . . . Shortly after this decision we unanimously made it clear that *Hines v. Davidowitz* was not intended to relax the requirement of practical and effective conflict between a State law and a federal enactment before a State police measure can be nullified, and that the international bearing of the circumstances made persuasive the finding of conflict in that case. What was said about *Hines v. Davidowitz* in *Allen-Bradley Local v. Board*, 315 U.S. 740, 749, is precisely relevant here:

"In the *Hines* case, a federal system of alien registration was held to supersede a state system of registration. But there we were dealing with a problem which had an impact on the general field of foreign relations. The delicacy of the issues which were posed alone raised grave questions as to the propriety of allowing a state system of regulation to function alongside of a federal system. In that field, any 'concurrent state power that may exist is restricted to the narrowest of limits.' P. 68. Therefore, we were more ready to conclude that a federal Act in a field that touched international relations superseded state regulation than we were in those cases where a State was exercising its historic powers over such traditionally local matters as public safety and order and the use of streets and highways. . . . Here, we are dealing with the latter type of problem. We will not lightly infer that Congress by the mere passage of a federal Act has impaired the traditional sovereignty of the several States in that regard."

In truth, when a State statute is assailed because of alleged conflict with a federal law, the same considerations of forbearance, the same regard for the lawmaking power of States, should guide the judicial judgment as when this Court is asked to declare a statute



unconstitutional outright. The problem of conflict arises only when the States have power concurrent with Congress to legislate; to find conflict is merely a form of denying the power of legislation to the States have power concurrent with Congress to legislate; to has been extremely cautious in upsetting State regulation unless it has found that the regulation devised by Congress and that by which the State dealt with some local concern cannot, in a practical world, coexist. Only then has the Court been justified in holding that Congress has manifested its will to displace the constitutional authority of the State. To strike down a State law when that which a State requires does not truly hinder or obstruct federal regulation is unwarrantably to deprive the States of their constitutional power.

These are the principles which have been recognized and applied by the vast body of the decisions of this Court, and they are the principles that should determine the fate of the Florida legislation now here for judgment.

. . . . .  
... It is an accurate summary of the Wagner Act to say that it aimed to equalize bargaining power between industrial employees and their employers by putting federal law behind the employees' right of association. The whole plan or scheme of the Wagner Act was to enable employees to bargain on a fair basis, freed from "restraint or coercion by their employer" through the protection given by the federal government. . . .

All proposals to make of the Wagner Act a more comprehensive industrial code, by dealing with the conduct of employees and their unions, were rejected. The rights Congress created, the obligations it defined, the machinery it devised for enforcing these rights and securing obedience to these obligations, all were exclusively concerned with putting the strength of the Government against this conduct by employers. All other aspects of industrial relations were left untouched by the Wagner Act, and purposely so. All activities or aspects of labor organizations outside of their right to be free from employer coercion were left wholly unregulated by that Act. Neither expressly nor by indirection did the Wagner Act displace whatever police power the States may have to deal with those aspects of the life of a trade union as to which Congress, with eyes wide open, refused to legislate. When Congress purposely dealt

only with the employer aspect of industrial relations and purposely abstained from making any rules touching union activities, the internal affairs of unions, or the responsibility of union officials to union members and to the public, Congress certainly did not sponge out the States' police power as to these matters. It wipes out State power and distorts Congressional intention to disregard the limited policy explicitly set forth by Congress. That policy—curbing of employer interferences with union rights—was scrupulously observed by Congress in the substantive provisions as well as in the enforcement structure of the Act. There is not a breath in the Act referring to any aspect of union activity unrelated to employer interference therewith. By refusing to legislate beyond that, Congress did not forbid the States from so legislating.

If Congress tomorrow chose to subject labor organizations and their officers to regulations similar to those dealt with in the Florida law, it could hardly be suggested that the Wagner Act, as it now stands, already covers these subjects. Specifically, if Congress were to make certain requirements for the filing of reports by labor organizations that seek to avail themselves of the rights defined by the Wagner Act, and also were to devise a system of identification and licensing of authorized representatives of the unions, one would be hard put to it to find anything in the Wagner Act to prove that it had already dealt with these matters. Congress may well believe that there is such a difference in local circumstances as to make it desirable to leave treatment of these matters to the different localities. In any event, since these subjects are outside of the Wagner Act for purposes of making additions by federal law, they cannot be inside it to justify nullification of the Florida law. Whether the interests of union members or of outsiders call for an identification and licensing system for men discharging the responsibilities of business agents, it is not for us to determine. The only issue before us is whether Florida is free to deal with these matters when Congress has not done so. To repeat what was said in *Allen-Bradley Local v. Board*, *supra*, "We will not lightly infer that Congress by the mere passage of a federal Act"—this very Act—"has impaired the traditional sovereignty of the several States" over such police matters as are the concern of the Florida legislation.

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## STATE TAXATION AND INTERSTATE TRANSPORTATION

*Northwest Airlines, Inc. v. Minnesota*

322 U.S. 292 (1944)

Few questions of constitutional power have occasioned as much disagreement among the present members of the Court as the problem presented for adjudication whenever state taxes are resisted on the ground that they reach interstate commerce in violation of the commerce clause. Indeed, it has become almost impossible to predict the course of decision in this field, and those who look for consistency in the case of individual Justices are likely to be disappointed. Thus, Mr. Justice Frankfurter, whose attachment to the values of federalism has led him to see the state's side of a problem more frequently than some of his colleagues, has written opinions in significant cases upholding the claims of interstate commerce against the states. In the *Northwest Airlines* case, however, he spoke for the majority in sustaining the right of the State of Minnesota to tax a fleet of airplanes engaged in interstate journeys.

*Northwest Airlines* is incorporated under the laws of Minnesota and has its principal place of business in that state. It owns and operates a fleet of interstate airplanes, whose home port and overhaul base is in Minnesota. None of the planes was continuously out of the state for the entire tax year.

Minnesota's attempt to apply its personal property tax to the income from this business precipitated a controversy which made it necessary for the Supreme Court to pass for the first time on the scope of the states' power to tax air transport. Justice Frankfurter's opinion in this case held that as the state of the corporation's "home port" and legal domicile, Minnesota was entitled to tax for the protection and benefits extended by it. Chief Justice Stone protested in dissent that in allowing Minnesota to tax an entire fleet of airplanes operated in interstate commerce, the Court was exposing airlines to the risk of having their earnings taxed by more than one state—the risk of multiple taxation. Justices Roberts, Reed, and Rutledge agreed with him.

Four years later, we find Mr. Justice Frankfurter speaking for a majority of six in upsetting state taxation of a more conventional form of interstate transportation. *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948). The New York State Tax Commission sought to tax the gross receipts of Central Greyhound Lines, which operates busses between certain points within New York State but over routes that utilize

the highways of New Jersey and Pennsylvania. In reversing the New York Court of Appeals, which had upheld the Commission, Mr. Justice Frankfurter's opinion for the Court relied in the main on the fact that 43% of the mileage traversed by the busses lay within New Jersey and Pennsylvania. When so substantial a part of the journey occurs in other states, he maintained, the business cannot be said to be confined to New York. Such an unapportioned tax would subject interstate transportation to more than its fair share of the cost of local government. But the entire tax need not fall. The state was free, Justice Frankfurter held, to evolve a formula which would undertake to apportion the tax on the bus company to the mileage traversed in New York.

Supported in his views by Justices Black and Douglas, Mr. Justice Murphy argued in dissent that the business of transporting passengers and freight between points in the same state is essentially local, even though the journey is in part interstate. As Justice Murphy said, "From the standpoint of physical movement, there is a crossing of state lines and a journey over territory belonging to more states than one—a movement that is undeniably interstate. At the same time, however, the business of transporting passengers or freight between points in the same state is essentially local in character despite the interstate movement."

This attempt to demonstrate that the business of the bus company was, in the language of Justice Murphy, "physically interstate and commercially local" was characterized by Mr. Justice Frankfurter as "pure fiction."

Mr. Justice Frankfurter's opinion announcing the conclusion and judgment of the Court in *Northwest Airlines, Inc. v. Minnesota* read in part as follows:

The question before us is whether the Commerce Clause or the Due Process Clause of the Fourteenth Amendment bars the State of Minnesota from enforcing the personal property tax it has laid on the entire fleet of airplanes owned by the petitioner and operated by it in interstate transportation. The answer involves the application of settled legal principles to the precise circumstances of this case. To these, about which there is no dispute, we turn.

Northwest Airlines is a Minnesota corporation and its principal place of business is St. Paul. It is a commercial airline carrying persons, property and mail on regular fixed routes, with due allowance for weather, predominantly within the territory comprising Illinois, Minnesota, North Dakota, Montana, Oregon, Wisconsin and Washington. For all the planes St. Paul is the home port registered with

the Civil Aeronautics Authority, under whose certificate of convenience and necessity Northwest operates. At six of its scheduled cities, Northwest operates maintenance bases, but the work of rebuilding and overhauling the planes is done in St. Paul. . . .

The tax in controversy is for the year 1939. All of Northwest's planes were in Minnesota from time to time during that year. All were, however, continuously engaged in flying from State to State, except when laid up for repairs and overhauling for unidentified periods. On May 1, 1939, the time fixed by Minnesota for assessing personal property subject to its tax . . . Northwest's scheduled route mileage in Minnesota was 14% of its total scheduled route mileage, and the scheduled plane mileage was 16% of that scheduled. It based its personal property tax return for 1939 on the number of planes in Minnesota on May 1, 1939. Thereupon the appropriate taxing authority of Minnesota assessed a tax against Northwest on the basis of the entire fleet coming into Minnesota. For that additional assessment this suit was brought. . . .

The tax here assessed by Minnesota is a tax assessed upon "all personal property of persons residing therein, including the property of corporations . . . " . . . It is not a charge laid for engaging in interstate commerce or upon airlines specifically; it is not aimed by indirection against interstate commerce or measured by such commerce. Nor is the tax assessed against planes which were "continuously without the State during the whole tax year," *N.Y. Central & H.R.R. Co. v. Miller*, 202 U.S. 584, 594, and had thereby acquired "a permanent location elsewhere" . . .

Minnesota is here taxing a corporation for all its property within the State during the tax year no part of which receives permanent protection from any other State. The benefits given to Northwest by Minnesota and for which Minnesota taxes—its corporate facilities and the governmental resources which Northwest enjoys in the conduct of its business in Minnesota—are concretely symbolized by the fact that Northwest's principal place of business is in St. Paul and that St. Paul is the "home port" of all its planes. The relation between Northwest and Minnesota—a relation existing between no other State and Northwest—and the benefits which this relation affords are the constitutional foundation for the taxing power which Minnesota has asserted. . . . No other State can claim to tax as the State of the legal domicile as well as the home State of the fleet,

as a business fact. No other State is the State which gave Northwest the power to be as well as the power to function as Northwest functions in Minnesota; no other State could impose a tax that derives from the significant legal relation of creator and creature and the practical consequences of that relation in this case. On the basis of rights which Minnesota alone originated and Minnesota continues to safeguard, she alone can tax the personalty which is permanently attributable to Minnesota and to no other State. It is too late to suggest that this taxing power of a State is less because the tax may be reflected in the cost of transportation. . . .

Such being the case, it is clearly ruled by *N.Y. Central & H.R.R. Co. v. Miller*, *supra*. Here, as in that case, a corporation is taxed for all its property within the State during the tax year none of which was "continuously without the State during the whole tax year." . . . The fact that Northwest paid personal property taxes for the year 1939 upon "some proportion of its full value" of its airplane fleet in some other States does not abridge the power of taxation of Minnesota as the home State of the fleet in the circumstances of the present case. The taxability of any part of this fleet by any other State than Minnesota, in view of the taxability of the entire fleet by that State, is not now before us. . . .

The doctrine of tax apportionment for instrumentalities engaged in interstate commerce introduced by *Pullman's Car Co. v. Pennsylvania*, 141 U.S. 18, is here inapplicable. The principle of that case is that a non-domiciliary State may tax an interstate carrier "engaged in running railroad cars into, through and out of the State, and having at all times a large number of cars within the State . . . by taking as the basis of assessment such proportion of its capital stock as the number of miles of railroad over which its cars are run within the State bears to the whole number of miles in all the States over which its cars are run." . . . This principle was successively extended to the old means of transportation and communication, such as express companies and telegraph systems. But the doctrine of apportionment has neither in theory nor in practice been applied to tax units of interstate commerce visiting for fractional periods of the taxing year. . . . The continuous protection by a State other than the domiciliary State—that is, protection throughout the tax year—has furnished the constitutional basis for tax apportionment in these interstate commerce situations, and it is on that basis that the tax laws have been framed and administered.

The taxing power of the domiciliary State has a very different basis. It has power to tax because it is the State of domicile and no other State is. For reasons within its own sphere of choice Congress at one time chartered interstate carriers and at other times has left the chartering and all that goes with it to the States. That is a practical fact of legislative choice and a practical fact from which legal significance has always followed. . . . Congress of course could exert its controlling authority over commerce by appropriate regulation and exclude a domiciliary State from authority which it otherwise would have because it is the domiciliary State. But no judicial restriction has been applied against the domiciliary State except when property (or a portion of fungible units) is permanently situated in a State other than the domiciliary State. (\*) And permanently means continuously throughout the year, not a fraction thereof, whether days or weeks.

. . . Surely, the power of the State of origin to "tax its own corporations for all their property within the State during the tax year" cannot constitutionally be affected whether the property takes fixed trips or indeterminate trips so long as the property is not "continuously without the State during the whole tax year," . . . even when, as in the Miller case, from 12% to 64% of the property was shown to have been used outside of New York during the tax year, but in no one visited State permanently, that is, for the whole year. And that is the decisive constitutional fact about the Miller case—that although from 12% to 64% of the rolling stock of the railroad was outside of New York throughout the tax year, New York was nevertheless allowed to tax it all because no part was in any other State throughout the year.

To introduce a new doctrine of tax apportionment as a limitation upon the hitherto established taxing power of the home State is not merely to indulge in constitutional innovation. It is to introduce practical dislocation into the established taxing systems of the States. The doctrine of tax apportionment has been painfully evolved in working out the financial relations between the States and interstate transportation and communication conducted on land and thereby forming a part of the organic life of these States. Although a part of the taxing systems of this country, the rule of apportionment is beset with friction, waste and difficulties, but at all events it grew out of, and has established itself in regard to, land commerce. (\*) To what extent it should be carried over to the

totally new problems presented by the very different modes of transportation and communication that the airplane and the radio have already introduced, let alone the still more subtle and complicated technological facilities that are on the horizon, raises questions that we ought not to anticipate; certainly we ought not to embarrass the future by judicial answers which at best can deal only in a truncated way with problems sufficiently difficult even for legislative statesmanship.

The doctrine in the Miller case, which we here apply, does not subject property permanently located outside of the domiciliary State to double taxation. But not to subject property that has no locality other than the State of its owner's domicile to taxation there would free such floating property from taxation everywhere. And what the Miller case decided is that neither the Commerce Clause nor the Fourteenth Amendment affords such constitutional immunity.

Each new means of interstate transportation and communication has engendered controversy regarding the taxing powers of the States *inter se* and as between the States and the Federal Government. Such controversies and some conflict and confusion are inevitable under a federal system. They have long been a source of difficulty and dissatisfaction for us . . . and have equally plagued the British federal systems. . . . In response to arguments addressed also to us about the dangers of harassing state taxation affecting national transportation, the concurring judge below adverts to the power of Congress to incorporate airlines and to control their taxation. But insofar as these are matters that go beyond the constitutional issues which dispose of this case, they are not our concern.

### "THE HISTORIC DUTY OF THE COURT"

*Freeman v. Hewitt*

329 U.S. 249 (1946)

An Indiana broker was directed by a trustee of an estate created by a decedent residing in Indiana at the time of his death to arrange for the sale of certain securities. They were offered for sale on the New York



Stock Exchange through the Indiana broker's New York representatives. When a buyer was found, the trustee delivered the securities in Indiana to his Indiana broker, who mailed them to New York. The New York brokers made delivery, received the purchase price, and remitted the proceeds (less expense and commission) to the Indiana broker, who delivered the proceeds (less commission) to the trustee in Indiana.

In an opinion by Mr. Justice Frankfurter, the Court held that the Indiana Gross Income Tax Act of 1933 could not constitutionally be applied to the gross receipts from these sales, because it would constitute a direct burden on interstate commerce in violation of the commerce clause. Dissenting, Justice Douglas said bluntly that the Court was confusing a gross-receipts tax on the Indiana broker with a gross-receipts tax on his Indiana customer. He saw no reason for giving the Indiana customer immunity: "The receipt of income in Indiana, like the delivery of property there, . . . is a local transaction which constitutionally can be made a taxable event. For a local activity which is separate and distinct from interstate commerce may be taxed though intercommerce is induced or occasioned by it." Justice Murphy joined in these views. Justice Black also dissented but without opinion.

Mr. Justice Frankfurter's opinion read in part:

. . . . .  
The power of the States to tax and the limitations upon that power imposed by the Commerce Clause have necessitated a long, continuous process of judicial adjustment. The need for such adjustment is inherent in a federal government like ours, where the same transaction has aspects that may concern the interests and involve the authority of both the central government and the constituent States. (\*)

The history of this problem is spread over hundreds of volumes of our Reports. To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the settings of the particular cases and as the product of preoccupation with their special facts.

Our starting point is clear. In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. In short, the

Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. *Southern Pacific Co. v. Arizona*, 325 U.S. 761; *Morgan v. Virginia*, 328 U.S. 373. In so deciding we reaffirmed, upon fullest consideration, the course of adjudication unbroken through the Nation's history. This limitation on State power, as the *Morgan* case so well illustrates, does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States. It is immaterial that local commerce is subjected to a similar encumbrance. It may commend itself to a State to encourage a pastoral instead of an industrial society. That is its concern and its privilege. But to compare a State's treatment of its local trade with the exertion of its authority against commerce in the national domain is to compare incomparables.

These principles of limitation on State power apply to all State policy no matter what State interest gives rise to its legislation. A burden on interstate commerce is none the lighter and no less objectionable because it is imposed by a State under the taxing power rather than under manifestations of police power in the conventional sense. But, in the necessary accommodation between local needs and the overriding requirement of freedom for the national commerce, the incidence of a particular type of State action may throw the balance in support of the local need because interference with the national interest is remote or unsubstantial. A police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital local interests. At least until Congress chooses to enact a nation-wide rule, the power will not be denied to the State. . . . State taxation falling on interstate commerce, on the other hand, can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys. But revenue serves as well no matter what its source. To deny to a State a particular source of income because it taxes the very process of interstate commerce does not impose a crippling limitation on a State's ability to carry on its local function. Moreover, the burden on interstate commerce involved in a direct tax upon it is inherently greater, certainly less uncertain in its consequences, than results from the usual police regulations. The power to tax is a dominant power over commerce. Because the

greater or more threatening burden of a direct tax on commerce is coupled with the lesser need to a State of a particular source of revenue, attempts at such taxation have always been more carefully scrutinized and more consistently resisted than police power regulations of aspects of such commerce. The task of scrutinizing is a task of drawing lines. This is the historic duty of the Court so long as Congress does not undertake to make specific arrangements between the National Government and the States in regard to revenues from interstate commerce. . . . Considerations of proximity and degree are here, as so often in the law, decisive.

It has been suggested that such a tax is valid when a similar tax is placed on local trade, and a specious appearance of fairness is sought to be imparted by the argument that interstate commerce should not be favored at the expense of local trade. So to argue is to disregard the life of the Commerce Clause. Of course a State is not required to give active advantage to interstate trade. But it cannot aim to control that trade even though it desires to control its own. It cannot justify what amounts to a levy upon the very process of commerce across State lines by pointing to a similar hobble on its local trade. It is true that the existence of a tax on its local commerce detracts from the deterrent effect of a tax on interstate commerce to the extent that it removes the temptation to sell the goods locally. But the fact of such a tax, in any event, puts impediments upon the currents of commerce across the State line, while the aim of the Commerce Clause was precisely to prevent States from exacting toll from those engaged in national commerce. The Commerce Clause does not involve an exercise in the logic of empty categories. It operates within the framework of our federal scheme and with due regard to the national experience reflected by the decisions of this Court, even though the terms in which these decisions have been cast may have varied. Language alters, and there is a fashion in judicial writing as in other things.

This case, like *Adams Mfg. Co. v. Storen* [304 U.S. 307], involves a tax imposed by the State of the seller on the proceeds of interstate sales. To extract a fair tithe from interstate commerce for the local protection afforded to it, a seller State need not impose the kind of tax which Indiana here levied. As a practical matter, it can make such commerce pay its way, as the phrase runs, apart from taxing the very sale. Thus, it can tax local manufacture even if the

products are destined for other States. For some purposes, manufacture and the shipment of its products beyond a State may be looked upon as an integral transaction. But when accommodation must be made between state and national interests, manufacture within a State, though destined for shipment outside, is not a seamless web so as to prevent a State from giving the manufacturing part detached relevance for purposes of local taxation. . . . It can impose license taxes on domestic and foreign corporations who would do business in the State, . . . though it cannot, even under the guise of such excises, "hamper" interstate commerce. . . . It can tax the privilege of residence in the State and measure the privilege by net income, including that derived from interstate commerce. . . . And where, as in this case, the commodities subsequently sold interstate are securities, they can be reached by a property tax by the State of domicil of the owner. . . .

These illustrative instances show that a seller State has various means of obtaining legitimate contribution to the costs of its government, without imposing a direct tax on interstate sales. While these permitted taxes may, in an ultimate sense, come out of interstate commerce, they are not, as would be a tax on gross receipts, a direct imposition on that very freedom of commercial flow which for more than a hundred and fifty years has been the ward of the Commerce Clause.

It is suggested, however, that the validity of a gross sales tax should depend on whether another State has also sought to impose its burden on the transactions. If another State has taxed the same interstate transaction, the burdensome consequences to interstate trade are undeniable. But that, for the time being, only one State has taxed is irrelevant to the kind of freedom of trade which the Commerce Clause generated. The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment. Courts are not possessed of instruments of determination so delicate as to enable them to weigh the various factors in a complicated economic setting which, as to an isolated application of a State tax, might mitigate the obvious burden generally created by a direct tax on commerce. Nor is there any warrant in the constitutional principles heretofore applied by this Court to support the notion that a State may be allowed one single-tax-worth of direct

interference with the free flow of commerce. An exaction by a State from interstate commerce falls not because of a proven increase in the cost of the product. What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce. Such a tax by the seller State alone must be judged burdensome in the context of the circumstances in which the tax takes effect. Trade being a sensitive plant, a direct tax upon it to some extent at least deters trade even if its effect is not precisely calculable. Many States, for instance, impose taxes on the consumption of goods, and such taxes have been sustained regardless of the extra-State origin of the goods, or whether a tax on their sale had been imposed by the seller State. Such potential taxation by consumer States is but one factor pointing to the deterrent effect on commerce by a superimposed gross receipts tax.

It has been urged that the force of the decision in the Adams case has been sapped by *McGoldrick v. Berwind-White Co.*, 309 U.S. 33. The decision in *McGoldrick v. Berwind-White* was found not to impinge upon "the rationale of the Adams Manufacturing Co. case," and the tax was sustained because it was "conditioned upon a local activity, delivery of goods within the state upon their purchase for consumption." 309 U.S. at 58. . . . Taxes which have the same effect as consumption taxes are properly differentiated from a direct imposition on interstate commerce, such as was before the Court in the Adams case and is now before us. The tax on the sale itself cannot be differentiated from a direct unapportioned tax on gross receipts which has been definitely held beyond the State taxing power . . .

. . . . .

### "JUDICIAL POWER TO GRANT A DIVORCE"

*Williams v. North Carolina*

325 U.S. 226 (1945)

Article IV, Section I of the United States Constitution provides: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." While this same section authorizes Congress to prescribe by law the manner in which such acts,

records and proceedings shall be given effect in the different states, Congress has not taken full advantage of this authority. We must look to Supreme Court decisions for the exact meaning of the full faith and credit clause, but these have not always been either clear or consistent. Particularly confusing has been the Court's handling of the question as to what effect a divorce obtained in one state shall be given in another. Two recent cases concerned with this delicate matter have aroused sharp controversy within and without the Court: *Williams v. North Carolina*, 317 U.S. 287 (1942) and *Williams v. North Carolina*, 325 U.S. 226 (1945).

In the first *Williams* case, the Court held that under the full faith and credit clause, a decree of divorce granted by a state to one who had met its residence requirements is binding upon the courts of other states, including the state in which the marriage was performed and where the other party to the marriage was still domiciled when the divorce was decreed. At the same time the Court overruled *Haddock v. Haddock*, 201 U.S. 562, a case which the North Carolina authorities cited as precedent for their refusal to recognize the validity of the Nevada divorces.

*Williams* and Mrs. Hendrix had gone from North Carolina to Las Vegas, Nevada, and after residing there for the required six weeks each filed for divorce in a Nevada court. Neither Mrs. Williams nor Hendrix was summoned as a defendant by personal service, and neither appeared to defend the action. The Nevada court granted the two divorces. On the same day, Williams and Mrs. Hendrix were married in Nevada and returned to North Carolina to live as man and wife. Refusing to recognize the validity of the Nevada divorce decrees, North Carolina proceeded to prosecute Williams and his new wife for "bigamous cohabitation." The prosecution relied on the fact that contrary to the requirement laid down in the *Haddock* case, personal summons had not been served upon the former Mrs. Williams and Mr. Hendrix. No direct attack was made on the residence of Williams and Mrs. Hendrix in Nevada as not being a bona fide domicil. Over the vigorous objections of Justices Murphy and Jackson, the Supreme Court simply assumed that the domicil was bona fide and not a sham and held that the Nevada court had jurisdiction over the marital status of the parties applying for divorce. Consequently, the full faith and credit clause compelled every other state to recognize the decrees, regardless of personal service of summons on the defendant spouses.

As was to be expected, after the decision in the first *Williams* case North Carolina brought another action attacking the domicil in Nevada. And this time the Supreme Court affirmed the convictions for bigamous cohabitation. Mr. Justice Frankfurter, who had concurred in the decision

in the first Williams case, wrote the majority opinion in the second Williams case. This is the way he explained the difference between the two cases:

"Williams v. North Carolina, 317 U.S. 287, . . . held that a divorce granted by Nevada . . . must be respected in North Carolina, where Nevada's finding of domicil was not questioned, though the other spouse had neither appeared nor been served with process in Nevada and though recognition of such a divorce offended the policy of North Carolina. The record then before us did not present the question whether North Carolina had the power 'to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada court, North Carolina finds that no *bona fide* domicil was acquired in Nevada.' . . . This is the precise issue which has emerged after retrial of the cause following our reversal."

Saying that a decree of divorce granted in one state may be questioned in another by showing that the court which had issued the decree had no jurisdiction, Justice Frankfurter's opinion went on to hold that since the power to grant a divorce depends on domicil a state affected by the decree may look into the existence of domicil. The Court found that the domicil in Nevada was not a *bona fide* one and stressed the jury's finding that Williams and Mrs. Hendrix had never intended to establish domicil in Nevada. The fact that they had lived in an auto-court for transients and had returned to North Carolina immediately upon marrying each other supported this finding by the jury.

Three Justices dissented—Black, Douglas, and Rutledge; Justices Rutledge and Black writing opinions in which they chided the majority for introducing unnecessarily confusing criteria in the construction of the full faith and credit clause and for being unmindful of the grave consequences of its decision for those divorced in states having liberal divorce laws.

Mr. Justice Frankfurter's opinion for the majority in the second Williams case read in part:

. . . . .  
Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil. . . . The framers of the Constitution were familiar with this jurisdictional prerequisite, and since 1789 neither this Court nor any other court in the English-speaking world has questioned it. Domicil implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost

significance. The domicil of one spouse within a State gives power to that State, we have held, to dissolve a marriage wheresoever contracted. . . . Divorce, like marriage, is of concern not merely to the immediate parties. It affects personal rights of the deepest significance. It also touches basic interests of society. Since divorce, like marriage, creates a new status, every consideration of policy makes it desirable that the effect should be the same wherever the question arises.

It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated as between the parties. . . . But those not parties to a litigation ought not to be foreclosed by the interested actions of others; especially not a State which is concerned with the vindication of its own social policy and has no means, certainly no effective means, to protect that interest against the selfish action of those outside its borders. The State of domiciliary origin should not be bound by an unfounded, even if not collusive, recital in the record of a court of another State. As to the truth or existence of a fact, like that of domicil, upon which depends the power to exert judicial authority, a State not a party to the exertion of such judicial authority in another State but seriously affected by it has a right, when asserting its own unquestioned authority, to ascertain the truth or existence of that crucial fact. (\*)

These considerations of policy are equally applicable whether power was assumed by the court of the first State or claimed after inquiry. This may lead, no doubt, to conflicting determinations of what judicial power is founded upon. Such conflict is inherent in the practical application of the concept of domicil in the context of our federal system. (\*) . . . If a finding by the court of one State that domicil in another State has been abandoned were conclusive upon the old domiciliary State, the policy of each State in matters of most intimate concern could be subverted by the policy of every other State. . . .

. . . the decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicil is a jurisdictional fact. To permit the necessary finding of domicil by one State to foreclose all States in the protection of their social institutions would be intolerable.



But to endow each State with controlling authority to nullify the power of a sister State to grant a divorce based upon a finding that one spouse had acquired a new domicile within the divorcing State would, in the proper functioning of our federal system, be equally indefensible. No State court can assume comprehensive attention to the various and potentially conflicting interests that several States may have in the institutional aspects of marriage. The necessary accommodation between the right of one State to safeguard its interest in the family relation of its own people and the power of another State to grant divorces can be left to neither State.

The problem is to reconcile the reciprocal respect to be accorded by the members of the Union to their adjudications with due regard for another most important aspect of our federalism whereby "the domestic relations of husband and wife . . . were matters reserved to the States," . . . and do not belong to the United States. . . . The rights that belong to all the States and the obligations which membership in the Union imposes upon all, are made effective because this Court is open to consider claims, such as this case presents, that the courts of one State have not given the full faith and credit to the judgment of a sister State that is required by Art. IV, §1, of the Constitution.

But the discharge of this duty does not make of this Court a court of probate and divorce. Neither a rational system of law nor hard practicality calls for our independent determination, in reviewing the judgment of a State court, of that rather elusive relation between person and place which establishes domicile. . . . The challenged judgment must, however, satisfy our scrutiny that the reciprocal duty of respect owed by the States to one another's adjudications has been fairly discharged, and has not been evaded under the guise of finding an absence of domicile and therefore a want of power in the court rendering the judgment.

What is immediately before us is the judgment of the Supreme Court of North Carolina. We have authority to upset it only if there is want of foundation for the conclusion that that Court reached. The conclusion it reached turns on its finding that the spouses who obtained the Nevada decrees were not domiciled there. The fact that the Nevada court found that they were domiciled there is entitled to respect, and more. The burden of undermining the verity which the Nevada decrees import rests heavily upon the assailant. But simply because the Nevada court found that it had power to

award a divorce decree cannot, we have seen, foreclose reexamination by another State. Otherwise, . . . a court's record would establish its power and the power would be proved by the record. Such circular reasoning would give one State a control over all the other States which the Full Faith and Credit Clause certainly did not confer. . . . If this Court finds that proper weight was accorded to the claims of power by the court of one State in rendering a judgment the validity of which is pleaded in defense in another State, that the burden of overcoming such respect by disproof of the substratum of fact—here domicil—on which such power alone can rest was properly charged against the party challenging the legitimacy of the judgment, that such issue of fact was left for fair determination by appropriate procedure, and that a finding adverse to the necessary foundation for any valid sister-State judgment was amply supported in evidence, we cannot upset the judgment before us. And we cannot do so even if we also found in the record of the court of original judgment warrant for its finding that it had jurisdiction. If it is a matter turning on local law, great deference is owed by the courts of one State to what a court of another State has done. . . . But when we are dealing as here with an historic notion common to all English-speaking courts, that of domicil, we should not find a want of deference to a sister State on the part of a court of another State which finds an absence of domicil where such a conclusion is warranted by the record.

When this case was first here, North Carolina did not challenge the finding of the Nevada court that petitioners had acquired domicils in Nevada. For her challenge of the Nevada decrees, North Carolina rested on *Haddock v. Haddock*, 201 U.S. 562. Upon retrial, however, the existence of domicil in Nevada became the decisive issue. The judgments of conviction now under review bring before us a record which may be fairly summarized by saying that the petitioners left North Carolina for the purpose of getting divorces from their respective spouses in Nevada and as soon as each had done so and married one another they left Nevada and returned to North Carolina to live there together as man and wife. Against the charge of bigamous cohabitation . . . petitioners stood on their Nevada divorces and offered exemplified copies of the Nevada proceedings. (\*) . . .

The scales of justice must not be unfairly weighted by a State

when full faith and credit is claimed for a sister-State judgment. But North Carolina has not so dealt with the Nevada decrees. She has not raised unfair barriers to their recognition. North Carolina did not fail in appreciation or application of federal standards of full faith and credit. Appropriate weight was given to the finding of domicil in the Nevada decrees, and that finding was allowed to be overturned only by relevant standards of proof. There is nothing to suggest that the issue was not fairly submitted to the jury and that it was not fairly assessed on cogent evidence.

State courts cannot avoid review by this Court of their disposition of a constitutional claim by casting it in the form of an unreviewable finding of fact. . . . This record is barren of such attempted evasion. What it shows is that petitioners, long-time residents of North Carolina, came to Nevada, where they stayed in an auto-court for transients, filed suits for divorce as soon as the Nevada law permitted, married one another as soon as the divorces were obtained, and promptly returned to North Carolina to live. It cannot reasonably be claimed that one set of inferences rather than another regarding the acquisition by petitioners of new domicils in Nevada could not be drawn from the circumstances attending their Nevada divorces. It would be highly unreasonable to assert that a jury could not reasonably find that the evidence demonstrated that petitioners went to Nevada solely for the purpose of obtaining a divorce and intended all along to return to North Carolina. Such an intention, the trial court properly charged, would preclude acquisition of domicils in Nevada. . . . And so we cannot say that North Carolina was not entitled to draw the inference that petitioners never abandoned their domicils in North Carolina, particularly since we could not conscientiously prefer, were it our business to do so, the contrary finding of the Nevada court.

If a State cannot foreclose, on review here, all the other States by its finding that one spouse is domiciled within its bounds, persons may, no doubt, place themselves in situations that create unhappy consequences for them. This is merely one of those untoward results inevitable in a federal system in which regulation of domestic relations has been left with the States and not given to the national authority. But the occasional disregard by any one State of the reciprocal obligations of the forty-eight States to respect the constitutional power of each to deal with domestic relations of those

domiciled within its borders is hardly an argument for allowing one State to deprive the other forty-seven States of their constitutional rights. Relevant statistics happily do not justify lurid forebodings that parents without number will disregard the fate of their offspring by being unmindful of the status of dignity to which they are entitled. But, in any event, to the extent that some one State may, for considerations of its own, improperly intrude into domestic relations subject to the authority of the other States, it suffices to suggest that any such indifference by a State to the bond of the Union should be discouraged, not encouraged.

In seeking a decree of divorce outside the State in which he has theretofore maintained his marriage, a person is necessarily involved in the legal situation created by our federal system whereby one State can grant a divorce of validity in other States only if the applicant has a *bona fide* domicil in the State of the court purporting to dissolve a prior legal marriage. The petitioners therefore assumed the risk that this Court would find that North Carolina justifiably concluded that they had not been domiciled in Nevada. Since the divorces which they sought and received in Nevada had no legal validity in North Carolina and their North Carolina spouses were still alive, they subjected themselves to prosecution for bigamous cohabitation under North Carolina law. The legitimate finding of the North Carolina Supreme Court that the petitioners were not in truth domiciled in Nevada was not a contingency against which the petitioners were protected by anything in the Constitution of the United States. A man's fate often depends, as for instance in the enforcement of the Sherman Law, on far greater risks that he will estimate "rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death." *Nash v. United States*, 229 U.S. 373, 377. The objection that punishment of a person for an act as a crime when ignorant of the facts making it so, involves a denial of due process of law has more than once been overruled. In vindicating its public policy and particularly one so important as that bearing upon the integrity of family life, a State in punishing particular acts may provide that "he who shall do them shall do them at his peril and will not be heard to plead in defense good faith or ignorance." . . . Mistaken

notions about one's legal rights are not sufficient to bar prosecution for crime.

We conclude that North Carolina was not required to yield her State policy because a Nevada court found that petitioners were domiciled in Nevada when it granted them decrees of divorce. North Carolina was entitled to find, as she did, that they did not acquire domicils in Nevada and that the Nevada court was therefore without power to liberate the petitioners from amenability to the laws of North Carolina governing domestic relations. . . .

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## FREEDOM AND DEMOCRACY

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### MINORITY RIGHTS AND "APPEAL FROM LEGISLATION TO ADJUDICATION"

*West Virginia State Board of Education v. Barnette*

319 U.S. 624, 646 (1943)

The first of Mr. Justice Frankfurter's opinions in a civil liberty case to evoke considerable criticism was his opinion for the Court in *Minersville School District v. Gobitis*, decided in June, 1940. 310 U.S. 586. It was in this case that the Court held that the children of Jehovah's Witnesses, the religious sect which considers a salute to the flag to be contrary to the First Commandment, could be compelled to participate in a daily flag salute ceremony at school. Pointing out that the salute to the flag was required of all children and was not directed against any particular religious group, Mr. Justice Frankfurter argued that the school-board regulation was a legitimate exertion of the legislative power to promote an "orderly, tranquil, and free society without which religious toleration itself is unattainable." He said that "national unity is the basis of national security" and that the flag is a "symbol of our national unity." The children's religious scruples must yield to society's higher claim to the right to foster loyalty in the formative years. Nor should courts use their "independent judgment" in determining whether the flag salute is educationally necessary in a program of citizenship training. Such an inquiry into the relative merits of various educational methods for promoting patriotism would make courts intrude into the field of "pedagogical and psychological dogma," a field in which courts have "no marked and certainly no controlling competence."

Justice Stone filed a lone dissent in this case. Seeing the compulsory flag salute as a device for forcing children to profess something which

they did not believe, and which offended their "deepest religious convictions," he insisted that since there were other ways of teaching loyalty and patriotism, the Court would not be depriving the state of any power if it held that the flag salute was not a proper means for achieving the end it sought. He sharply criticized his colleagues for ignoring the fact that the religious sect involved was a politically helpless minority, so that Justice Frankfurter's hopeful suggestion that the democratic process was available for winning a change in policy did not reckon with the realities of the situation. The Court, he said, was surrendering its function as protector of minorities against unconstitutional demands of the "popular will."

The three closing paragraphs of Mr. Justice Frankfurter's opinion in the *Gobitis* case succinctly summarize his position on the merits of the controversy as well as his view of the Supreme Court's function in safeguarding civil liberty:

"What the school authorities are really asserting is the right to awaken in the child's mind considerations as to the significance of the flag contrary to those implanted by the parent. In such an attempt the state is normally at a disadvantage in competing with the parent's authority, so long—and this is the vital aspect of religious toleration—as parents are unmolested in their right to counteract by their own persuasiveness the wisdom and rightness of those loyalties which the state's educational system is seeking to promote. Except where the transgression of constitutional liberty is too plain for argument, personal freedom is best maintained—so long as the remedial channels of the democratic process remain open and unobstructed—when it is ingrained in a people's habits and not enforced against popular policy by the coercion of adjudicated law. That the flag-salute is an allowable portion of a school program for those who do not invoke conscientious scruples is surely not debatable. But for us to insist that, though the ceremony may be required, exceptional immunity must be given to dissidents, is to maintain that there is no basis for a legislative judgment that such an exemption might introduce elements of difficulty into the school discipline, might cast doubts in the minds of the other children which would themselves weaken the effect of the exercise.

"The preciousness of the family relation, the authority and independence which give dignity to parenthood, indeed the enjoyment of all freedom, presupposes the kind of ordered society which is summarized by our flag. A society which is dedicated to the preservation of these ultimate values of civilization may in self-protection utilize the educational process for inculcating those almost unconscious feelings which bind men together in a comprehending loyalty, whatever may be their

lesser differences and difficulties. That is to say, the process may be utilized so long as men's right to believe as they please, to win others to their way of belief, and their right to assemble in their chosen places of worship for the devotional ceremonies of their faith, are all fully respected.

"Judicial review, itself a limitation on popular government, is a fundamental part of our constitutional scheme. But to the legislature no less than to courts is committed the guardianship of deeply-cherished liberties. . . . Where all the effective means of inducing political changes are left free from interference, education in the abandonment of foolish legislation is itself a training in liberty. To fight out the wise use of legislative authority in the forum of public opinion and before legislative assemblies rather than to transfer such a contest to the judicial arena, serves to vindicate the self-confidence of a free people."

The barrage of critical comment which greeted the *Gobitis* decision must have had a telling effect on the Court, powerful enough indeed to cause some of the Justices to change their minds. Within two years Justices Black, Douglas, and Murphy announced publicly that they had come to believe that the case had been "wrongly decided," and a year later they voted to overrule the 1940 decision. Their opportunity came when the Court agreed to entertain a challenge to the flag salute regulation adopted by the West Virginia State Board of Education in 1942. The resolution in question contained many excerpts from Justice Frankfurter's opinion in the *Gobitis* case and directed pupils and teachers to participate in a daily flag salute ceremony. A child refusing to join in the exercises could be expelled, and once expelled was to be "considered unlawfully absent." His parent or guardian was made subject to prosecution. The Jehovah's Witnesses who sought to restrain enforcement of the regulation complained that as applied to them it violated their religious freedom and freedom of speech.

This time a majority of the Supreme Court was persuaded that a compulsory flag salute was unconstitutional. In addition to Justice Stone, the new majority included Justices Black, Douglas, and Murphy and the two members who had joined the Court since the *Gobitis* decision, namely, Justices Jackson and Rutledge. Their spokesman was Mr. Justice Jackson. Justices Roberts, Reed, and Frankfurter adhered to their views in the *Gobitis* case, Mr. Justice Frankfurter writing a long and impassioned dissent concerned in large measure with the Supreme Court's role as "guardian" of constitutional liberties.

For the Court to uphold the compulsory flag salute, Justice Jackson remarked at the outset of his opinion, it would have to declare that "a Bill of Rights which guards the individual's right to speak his own mind,



left it open to public authorities to compel him to utter what is not in his mind." And turning to the part of Justice Frankfurter's Gobitis opinion which had questioned the Court's competence to pass on the need for the flag salute and which had pleaded for a greater recognition of the protection afforded by legislatures and public opinion, he dismissed the argument as ignoring the historic purpose of the Bill of Rights. "The very purpose of the Bill of Rights," he reminded us, was to withdraw certain matters "from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." The judicial duty to enforce the Bill of Rights need not be justified by any claim of special competence: "We act in these matters not by authority of our competence but by force of our commissions. We cannot, because of our modest estimates of our competence in such specialties as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed." It may be true that national unity is the basis of national security and that legislatures are free to determine the methods for fostering the necessary loyalties. But the compulsory flag salute is not a "permissible means," however lawful and desirable the end may be. Considering how harmless the sect of Jehovah's Witnesses happens to be, the Court saw no "clear and present" danger that the "social organization" would disintegrate if patriotism were fostered by voluntary rather than by compulsory programs of education.

Mr. Justice Frankfurter's dissenting opinion in the *Barnette* case said in part:

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedom guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. The duty of a judge who must decide which of two claims before the Court shall prevail, that of a State to enact and enforce laws within its general competence or that of an indi-

vidual to refuse obedience because of the demands of his conscience, is not that of the ordinary person. It can never be emphasized too much that one's own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one's duty on the bench. The only opinion of our own even looking in that direction that is material is our opinion whether legislators could in reason have enacted such a law. In the light of all the circumstances, including the history of this question in this Court, it would require more daring than I possess to deny that reasonable legislators could have taken the action which is before us for review. Most unwillingly, therefore, I must differ from my brethren with regard to legislation like this. I cannot bring my mind to believe that the "liberty" secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen.

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The admonition that judicial self-restraint alone limits arbitrary exercise of our authority is relevant every time we are asked to nullify legislation. The Constitution does not give us greater veto power when dealing with one phase of "liberty" than with another, or when dealing with grade school regulations than with college regulations that offend conscience, as was the case in *Hamilton v. Regents*, 293 U.S. 245. In neither situation is our function comparable to that of a legislature or are we free to act as though we were a super-legislature. Judicial self-restraint is equally necessary whenever an exercise of political or legislative power is challenged. There is no warrant in the constitutional basis of this Court's authority for attributing different roles to it depending upon the nature of the challenge to the legislation. Our power does not vary according to the particular provision of the Bill of Rights which is invoked. The right not to have property taken without just compensation has, so far as the scope of judicial power is concerned, the same constitutional dignity as the right to be protected against unreasonable searches and seizures, and the latter has no less claim than freedom of the press or freedom of speech or religious freedom. In no instance is this Court the primary protector of the particular liberty that is invoked. This Court has recognized, what hardly could be

denied, that all the provisions of the first ten Amendments are "specific" prohibitions . . . But each specific Amendment, in so far as embraced within the Fourteenth Amendment, must be equally respected, and the function of this Court does not differ in passing on the constitutionality of legislation challenged under different Amendments.

When Mr. Justice Holmes, speaking for this Court, wrote that "it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts," . . . he went to the very essence of our constitutional system and the democratic conception of our society. He did not mean that for only some phases of civil government this Court was not to supplant legislatures and sit in judgment upon the right or wrong of a challenged measure. He was stating the comprehensive judicial duty and role of this Court in our constitutional scheme whenever legislation is sought to be nullified on any ground, namely, that responsibility for legislation lies with legislatures, answerable as they are directly to the people, and this Court's only and very narrow function is to determine whether within the broad grant of authority vested in legislatures they have exercised a judgment for which reasonable justification can be offered.

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The reason why from the beginning even the narrow judicial authority to nullify legislation has been viewed with a jealous eye is that it serves to prevent the full play of the democratic process. The fact that it may be an undemocratic aspect of our scheme of government does not call for its rejection or its disuse. But it is the best of reasons, as this Court has frequently recognized, for the greatest caution in its use.

The precise scope of the question before us defines the limits of the constitutional power that is in issue. The State of West Virginia requires all pupils to share in the salute to the flag as part of school training in citizenship. The present action is one to enjoin the enforcement of this requirement by those in school attendance. We have not before us any attempt by the State to punish disobedient children or visit penal consequences on their parents. All that is in question is the right of the State to compel participation in this exercise by those who choose to attend the public schools.

We are not reviewing merely the action of a local school board.

The flag salute requirement in this case comes before us with the full authority of the State of West Virginia. We are in fact passing judgment on "the power of the State as a whole." . . . Practically we are passing upon the political power of each of the forty-eight states. Moreover, since the First Amendment has been read into the Fourteenth, our problem is precisely the same as it would be if we had before us an Act of Congress for the District of Columbia. To suggest that we are here concerned with the heedless action of some village tyrants is to distort the augustness of the constitutional issue and the reach of the consequences of our decision.

Under our constitutional system the legislature is charged solely with civil concerns of society. If the avowed or intrinsic legislative purpose is either to promote or to discourage some religious community or creed, it is clearly within the constitutional restrictions imposed on legislatures and cannot stand. But it by no means follows that legislative power is wanting whenever a general non-discriminatory civil regulation in fact touches conscientious scruples or religious beliefs of an individual or a group. Regard for such scruples or beliefs undoubtedly presents one of the most reasonable claims for the exertion of legislative accommodation. It is, of course, beyond our power to rewrite the State's requirement, by providing exemptions for those who do not wish to participate in the flag salute or by making some other accommodations to meet their scruples. That wisdom might suggest the making of such accommodations and that school administration would not find it too difficult to make them and yet maintain the ceremony for those not refusing to conform, is outside our province to suggest. Tact, respect, and generosity toward variant views will always commend themselves to those charged with the duties of legislation so as to achieve a maximum of good will and to require a minimum of unwilling submission to a general law. But the real question is, who is to make such accommodations, the courts or the legislature?

This is no dry, technical matter. It cuts deep into one's conception of the democratic process—it concerns no less the practical differences between the means for making these accommodations that are open to courts and to legislatures. A court can only strike down. It can only say "This or that is void." It cannot modify or qualify, it cannot make exceptions to a general requirement. And it strikes down not merely for a day. At least the finding of unconstitu-

tionality ought not to have ephemeral significance unless the Constitution is to be reduced to the fugitive importance of mere legislation. When we are dealing with the Constitution of the United States, and more particularly with the great safeguards of the Bill of Rights, we are dealing with principles of liberty and justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental"—something without which "a fair and enlightened system of justice would be impossible." . . . If the function of this Court is to be essentially no different from that of a legislature, if the considerations governing constitutional construction are to be substantially those that underlie legislation, then indeed judges should not have life tenure and they should be made directly responsible to the electorate. There have been many but unsuccessful proposals in the last sixty years to amend the Constitution to that end. . . .

Conscientious scruples, all would admit, cannot stand against every legislative compulsion to do positive acts in conflict with such scruples. We have been told that such compulsions override religious scruples only as to major concerns of the state. But the determination of what is major and what is minor itself raises questions of policy. For the way in which men equally guided by reason appraise importance goes to the very heart of policy. Judges should be very diffident in setting their judgment against that of a state in determining what is and what is not a major concern, what means are appropriate to proper ends, and what is the total social cost in striking the balance of imponderables.

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An act compelling profession of allegiance to a religion, no matter how subtly or tenuously promoted, is bad. But an act promoting good citizenship and national allegiance is within the domain of governmental authority and is therefore to be judged by the same considerations of power and of constitutionality as those involved in the many claims of immunity from civil obedience because of religious scruples.

That claims are pressed on behalf of sincere religious convictions does not of itself establish their constitutional validity. Nor does waving the banner of religious freedom relieve us from examining into the power we are asked to deny the states. Otherwise the doc-

trine of separation of church and state, so cardinal in the history of this nation and for the liberty of our people, would mean not the disestablishment of a state church but the establishment of all churches and of all religious groups.

The subjection of dissidents to the general requirement of saluting the flag, as a measure conducive to the training of children in good citizenship, is very far from being the first instance of exacting obedience to general laws that have offended deep religious scruples. Compulsory vaccination, . . . food inspection regulations, . . . the obligation to bear arms, . . . testimonial duties, . . . compulsory medical treatment . . . —these are but illustrations of conduct that has often been compelled in the enforcement of legislation of general applicability even though the religious consciences of particular individuals rebelled at the exaction.

Law is concerned with external behavior and not with the inner life of man. It rests in large measure upon compulsion. Socrates lives in history partly because he gave his life for the conviction that duty of obedience to secular law does not presuppose consent to its enactment or belief in its virtue. The consent upon which free government rests is the consent that comes from sharing in the process of making and unmaking laws. The state is not shut out from a domain because the individual conscience may deny the state's claim. The individual conscience may profess what faith it chooses. It may affirm and promote that faith—in the language of the Constitution, it may "exercise" it freely—but it cannot thereby restrict community action through political organs in matters of community concern, so long as the action is not asserted in a discriminatory way either openly or by stealth. One may have the right to practice one's religion and at the same time owe the duty of formal obedience to laws that run counter to one's beliefs. Compelling belief implies denial of opportunity to combat it and to assert dissident views. Such compulsion is one thing. Quite another matter is submission to conformity of action while denying its wisdom or virtue and with ample opportunity for seeking its change or abrogation.

In *Hamilton v. Regents*, 293 U.S. 245, this Court unanimously held that one attending a state-maintained university cannot refuse attendance on courses that offend his religious scruples. That decision is not overruled today, but is distinguished on the ground

that attendance at the institution for higher education was voluntary and therefore a student could not refuse compliance with its conditions and yet take advantage of its opportunities. But West Virginia does not compel the attendance at its public schools of the children here concerned. West Virginia does not so compel, for it cannot. This Court denied the right of a state to require its children to attend public schools. *Pierce v. Society of Sisters*, 268 U.S. 510. As to its public schools, West Virginia imposes conditions which it deems necessary in the development of future citizens precisely as California deemed necessary the requirements that offended the student's conscience in the *Hamilton* case. The need for higher education and the duty of the state to provide it as part of a public educational system, are part of the democratic faith of most of our states. The right to secure such education in institutions not maintained by public funds is unquestioned. But the practical opportunities for obtaining what is becoming in increasing measure the conventional equipment of American youth may be no less burdensome than that which parents are increasingly called upon to bear in sending their children to parochial schools because the education provided by public schools, though supported by their taxes, does not satisfy their ethical and educational necessities. I find it impossible, so far as constitutional power is concerned, to differentiate what was sanctioned in the *Hamilton* case from what is nullified in this case. And for me it still remains to be explained why the grounds of Mr. Justice Cardozo's opinion in *Hamilton v. Regents*, *supra*, are not sufficient to sustain the flag salute requirement. Such a requirement, like the requirement in the *Hamilton* case, "is not an interference by the state with the free exercise of religion when the liberties of the constitution are read in the light of a century and a half of history during days of peace and war." . . . The religious worshipper, "if his liberties were to be thus extended, might refuse to contribute taxes . . . in furtherance of any other end condemned by his conscience as irreligious or immoral. The right of private judgment has never yet been so exalted above the powers and the compulsion of the agencies of government." . . .

Parents have the privilege of choosing which schools they wish their children to attend. And the question here is whether the state may make certain requirements that seem to it desirable or important for the proper education of those future citizens who go to

schools maintained by the states, or whether the pupils in those schools may be relieved from those requirements if they run counter to the consciences of their parents. Not only have parents the right to send children to schools of their own choosing but the state has no right to bring such schools "under a strict governmental control" or give "affirmative direction concerning the intimate and essential details of such schools, entrust their control to public officers, and deny both owners and patrons reasonable choice and discretion in respect of teachers, curriculum, and textbooks." *Farrington v. Tokushige*, 273 U.S. 284, 298. Why should not the state likewise have constitutional power to make reasonable provisions for the proper instruction of children in schools maintained by it?

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We are told that a flag salute is a doubtful substitute for adequate understanding of our institutions. The states that require such a school exercise do not have to justify it as the only means for promoting good citizenship in children, but merely as one of diverse means for accomplishing a worthy end. We may deem it a foolish measure, but the point is that this Court is not the organ of government to resolve doubts as to whether it will fulfill its purpose. Only if there be no doubt that any reasonable mind could entertain can we deny to the states the right to resolve doubts their way and not ours.

That which to the majority may seem essential for the welfare of the state may offend the consciences of a minority. But, so long as no inroads are made upon the actual exercise of religion by the minority, to deny the political power of the majority to enact laws concerned with civil matters, simply because they may offend the consciences of a minority, really means that the consciences of a minority are more sacred and more enshrined in the Constitution than the consciences of a majority.

We are told that symbolism is a dramatic but primitive way of communicating ideas. Symbolism is inescapable. Even the most sophisticated live by symbols. But it is not for this Court to make psychological judgments as to the effectiveness of a particular symbol in inculcating concededly indispensable feelings, particularly if the state happens to see fit to utilize the symbol that represents our heritage and our hopes. And surely only flippancy could be



responsible for the suggestion that constitutional validity of a requirement to salute our flag implies equal validity of a requirement to salute a dictator. The significance of a symbol lies in what it represents. To reject the swastika does not imply rejection of the Cross. And so it bears repetition to say that it mocks reason and denies our whole history to find in the allowance of a requirement to salute our flag on fitting occasions the seeds of sanction for obeisance to a leader. To deny the power to employ educational symbols is to say that the state's educational system may not stimulate the imagination because this may lead to unwise stimulation.

The right of West Virginia to utilize the flag salute as part of its educational process is denied because, so it is argued, it cannot be justified as a means of meeting a "clear and present danger" to national unity. . . . But to measure the state's power to make such regulations as are here resisted by the imminence of national danger is wholly to misconceive the origin and purpose of the concept of "clear and present danger." To apply such a test is for the Court to assume, however unwittingly, a legislative responsibility that does not belong to it. To talk about "clear and present danger" as the touchstone of allowable educational policy by the states whenever school curricula may impinge upon the boundaries of individual conscience, is to take a felicitous phrase out of the context of the particular situation where it arose and for which it was adapted. Mr. Justice Holmes used the phrase "clear and present danger" in a case involving mere speech as a means by which alone to accomplish sedition in time of war. By that phrase he meant merely to indicate that, in view of the protection given to utterance by the First Amendment, in order that mere utterance may not be proscribed, "the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Schenck v. United States*, 249 U.S. 47, 52. The "substantive evils" about which he was speaking were inducement of insubordination in the military and naval forces of the United States and obstruction of enlistment while the country was at war. He was not enunciating a formal rule that there can be no restriction upon speech and, still less, no compulsion where conscience balks, unless imminent danger would thereby be wrought "to our institutions or our government."

The flag salute exercise has no kinship whatever to the oath tests so odious in history. For the oath test was one of the instruments for suppressing heretical beliefs. Saluting the flag suppresses no belief nor curbs it. Children and their parents may believe what they please, avow their belief and practice it. It is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction against the fullest opportunity on the part both of the children and of their parents to disavow as publicly as they choose to do so the meaning that others attach to the gesture of salute. All channels of affirmative free expression are open to both children and parents. Had we before us any act of the state putting the slightest curbs upon such free expression, I should not lag behind any member of this Court in striking down such an invasion of the right to freedom of thought and freedom of speech protected by the Constitution.

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One's conception of the Constitution cannot be severed from one's conception of a judge's function in applying it. The Court has no reason for existence if it merely reflects the pressures of the day. Our system is built on the faith that men set apart for this special function, freed from the influences of immediacy and from the deflections of worldly ambition, will become able to take a view of longer range than the period of responsibility entrusted to Congress and legislatures. We are dealing with matters as to which legislators and voters have conflicting views. Are we as judges to impose our strong convictions on where wisdom lies? That which three years ago had seemed to five successive Courts to lie within permissible areas of legislation is now outlawed by the deciding shift of opinion of two Justices. What reason is there to believe that they or their successors may not have another view a few years hence? Is that which was deemed to be of so fundamental a nature as to be written into the Constitution to endure for all times to be the sport of shifting winds of doctrine? Of course, judicial opinions, even as to questions of constitutionality, are not immutable. As has been true in the past, the Court will from time to time reverse its position. But I believe that never before these Jehovah's Witnesses cases (except for minor deviations subsequently retraced) has this Court overruled decisions so as to restrict the powers of democratic govern-

ment. Always heretofore, it has withdrawn narrow views of legislative authority so as to authorize what formerly it had denied.

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In the past this Court has from time to time set its views of policy against that embodied in legislation by finding laws in conflict with what was called the "spirit of the Constitution." Such undefined destructive power was not conferred on this Court by the Constitution. Before a duly enacted law can be judicially nullified, it must be forbidden by some explicit restriction upon political authority in the Constitution. Equally inadmissible is the claim to strike down legislation because to us as individuals it seems opposed to the "plan and purpose" of the Constitution. That is too tempting a basis for finding in one's personal views the purposes of the Founders.

The uncontrollable power wielded by this Court brings it very close to the most sensitive areas of public affairs. As appeal from legislation to adjudication becomes more frequent, and its consequences more far-reaching, judicial self-restraint becomes more and not less important, lest we unwarrantably enter social and political domains wholly outside our concern. I think I appreciate fully the objections to the law before us. But to deny that it presents a question upon which men might reasonably differ appears to me to be intolerance. And since men may so reasonably differ, I deem it beyond my constitutional power to assert my view of the wisdom of this law against the view of the State of West Virginia.

Jefferson's opposition to judicial review has not been accepted by history, but it still serves as an admonition against confusion between judicial and political functions. As a rule of judicial self-restraint, it is still as valid as Lincoln's admonition. For those who pass laws not only are under duty to pass laws. They are also under duty to observe the Constitution. And even though legislation relates to civil liberties, our duty of deference to those who have the responsibility for making the laws is no less relevant or less exacting. And this is so especially when we consider the accidental contingencies by which one man may determine constitutionality and thereby confine the political power of the Congress of the United States and the legislatures of forty-eight states. The attitude of judicial humility which these considerations enjoin is not an abdication of the judicial function. It is a due observance of its limits. Moreover,

it is to be borne in mind that in a question like this we are not passing on the proper distribution of political power as between the states and the central government. We are not discharging the basic function of this Court as the mediator of powers within the federal system. To strike down a law like this is to deny a power to all government.

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Of course patriotism can not be enforced by the flag salute. But neither can the liberal spirit be enforced by judicial invalidation of illiberal legislation. Our constant preoccupation with the constitutionality of legislation rather than with its wisdom tends to preoccupation of the American mind with a false value. The tendency of focusing attention on constitutionality is to make constitutionality synonymous with wisdom, to regard a law as all right if it is constitutional. Such an attitude is a great enemy of liberalism. Particularly in legislation affecting freedom of thought and freedom of speech much which should offend a free-spirited society is constitutional. Reliance for the most precious interests of civilization, therefore, must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit.

FREEDOM OF SPEECH AND PICKETING "SET IN  
A BACKGROUND OF VIOLENCE"

*Milk Wagon Drivers Union v. Meadowmoor Dairies*

312 U.S. 287 (1941)

In the leading case of *Thornhill v. Alabama*, decided in 1940, the Supreme Court held for the first time that laws prohibiting peaceful picketing violate freedom of speech and press. 310 U. S. 88. Said Justice Murphy, speaking for the Court in the *Thornhill* case: "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within the area of free discussion that is guaranteed by the Constitution." To the same effect is *Carlson v. California*, decided the same day.

Mr. Justice Frankfurter helped to form the majority in these cases. However, the opinion he wrote in the *Meadowmoor* case, printed below, was viewed by the dissenters as greatly weakening the right established by the *Thornhill* decision. It sustained a sweeping labor injunction growing out of a strike by milk-wagon drivers in Chicago. A master named by the trial court had found that there had been considerable violence and recommended that all picketing, and not merely acts of violence, be enjoined. This was done, and the Supreme Court allowed the decree to stand. Justice Frankfurter denied that the Court's opinion was in any way qualifying the constitutional protection which the *Thornhill* and *Carlson* cases extended to peaceful picketing. The statutes involved in those cases were bad "on their face" since they forbade all picketing near an employer's place of business. There was no question of violence. In the Chicago strike, on the other hand, the alleged violence was not merely "episodic" or "isolated." Justice Frankfurter's chief contention seemed to be that since the picketing was completely "enmeshed" with violence, the Illinois court was justified in banning all picketing:

"No one will deny that Illinois can protect its storekeepers from being coerced by fear of window-smashings or burnings or bombings. And acts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence. The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful."

To Justice Black, who wrote a caustic and factually detailed dissent, concurred in by Justice Douglas, it was particularly regrettable that the majority opinion was devoid of any clear-cut guides or standards for differentiating peaceful picketing from picketing which could be enjoined because of violence. There was no evidence that there were continuous acts of violence, or that the union or its officers encouraged whatever sporadic violence did take place. The master's report exonerated the union and its officials of any blame. In his separate dissenting opinion, Justice Reed argued that restraining peaceful picketing in the future because of past conduct is nothing short of prior censorship amounting to a denial of free speech.

Mr. Justice Frankfurter spoke for the majority in the *Meadowmoor* case, saying in part:

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The "vendor system" for distributing milk in Chicago gave rise to the dispute. Under that system . . . milk is sold by the dairy companies to vendors operating their own trucks who resell to

retailers. These vendors departed from the working standards theretofore achieved by the Union for its members as dairy employees. The Union, in order to compel observance of the established standards, took action against dairies using the vendor system. The present respondent, Meadowmoor Dairies, Inc., brought suit against the Union and its officials to stop interference with the distribution of its products. A preliminary injunction restraining all union conduct, violent and peaceful, promptly issued, and the case was referred to a master for report. Besides peaceful picketing of the stores handling Meadowmoor's products, the master found that there had been violence on a considerable scale. Witnesses testified to more than fifty instances of window-smashing; explosive bombs caused substantial injury to the plants of Meadowmoor and another dairy using the vendor system and to five stores; stench bombs were dropped in five stores; three trucks of vendors were wrecked, seriously injuring one driver, and another was driven into a river; a store was set on fire and in large measure ruined; two trucks of vendors were burned; a storekeeper and a truck driver were severely beaten; workers at a dairy which, like Meadowmoor, used the vendor system were held with guns and severely beaten about the head while being told "to join the union"; carloads of men followed vendors' trucks, threatened the drivers, and in one instance shot at the truck and driver. In more than a dozen of these occurrences, involving window-smashing, bombings, burnings, the wrecking of trucks, shootings, and beatings, there was testimony to identify the wrongdoers as union men. (\*) In the light of his findings, the master recommended that all picketing, and not merely violent acts, should be enjoined. The trial court, however, accepted the recommendations only as to acts of violence and permitted peaceful picketing. The reversal of this ruling by the supreme court, . . . directing a permanent injunction as recommended by the master, is now before us.

The question which thus emerges is whether a state can choose to authorize its courts to enjoin acts of picketing in themselves peaceful when they are enmeshed with contemporaneously violent conduct which is concededly outlawed. The Constitution is invoked to deny Illinois the power to authorize its courts to prevent the continuance and recurrence of flagrant violence, found after an ex-

tended litigation to have occurred under specific circumstances, by the terms of a decree familiar in such cases. Such a decree, arising out of a particular controversy and adjusted to it, raises totally different constitutional problems from those that would be presented by an abstract statute with an overhanging and undefined threat to free utterance. To assimilate the two is to deny to the states their historic freedom to deal with controversies through the concreteness of individual litigation rather than through the abstractions of a general law.

The starting point is *Thornhill's* case. That case invoked the constitutional protection of free speech on behalf of a relatively modern means for "publicizing, without annoyance or threat of any kind, the facts of a labor dispute." 310 U.S. 100. The whole series of cases defining the scope of free speech under the Fourteenth Amendment are facets of the same principle in that they all safeguard modes appropriate for assuring the right to utterance in different situations. Peaceful picketing is the workingman's means of communication.

It must never be forgotten, however, that the Bill of Rights was the child of the Enlightenment. Back of the guarantee of free speech lay faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind. It was in order to avert force and explosions due to restrictions upon rational modes of communication that the guarantee of free speech was given a generous scope. But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterance was not meant to be sheltered by the Constitution.

Still it is of prime importance that no constitutional freedom, least of all the guarantees of the Bill of Rights, be defeated by insubstantial findings of fact screening reality. That is why this Court has the ultimate power to search the records in the state courts where a claim of constitutionality is effectively made. And so the right of free speech cannot be denied by drawing from a trivial rough incident or a moment of animal exuberance the conclusion that otherwise peaceful picketing has the taint of force.

In this case the master found "intimidation of the customers of the plaintiff's vendors by the commission of the acts of violence," and the supreme court justified its decision because picketing, "in connection with or following a series of assaults or destruction of

property, could not help but have the effect of intimidating the persons in front of whose premises such picketing occurred and of causing them to believe that non-compliance would possibly be followed by acts of an unlawful character." It is not for us to make an independent valuation of the testimony before the master. We have not only his findings but his findings authenticated by the State of Illinois speaking through her supreme court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee here invoked. The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. To substitute our judgment for that of the state court is to transcend the limits of our authority. And to do so in the name of the Fourteenth Amendment in a matter peculiarly touching the local policy of a state regarding violence tends to discredit the great immunities of the Bill of Rights. No one will doubt that Illinois can protect its storekeepers from being coerced by fear of window-smashings or burnings or bombings. And acts which in isolation are peaceful may be part of a coercive thrust when entangled with acts of violence. The picketing in this case was set in a background of violence. In such a setting it could justifiably be concluded that the momentum of fear generated by past violence would survive even though future picketing might be wholly peaceful. So the supreme court of Illinois found. We cannot say that such a finding so contradicted experience as to warrant our rejection. Nor can we say that it was written into the Fourteenth Amendment that a state through its courts cannot base protection against future coercion on an inference of the continuing threat of past misconduct. . . .

These acts of violence are neither episodic nor isolated. Judges need not be so innocent of the actualities of such an industrial conflict as this record discloses as to find in the Constitution a denial of the right of Illinois to conclude that the use of force on such a scale was not the conduct of a few irresponsible outsiders. The Fourteenth Amendment still leaves the state ample discretion in dealing with manifestations of force in the settlement of industrial conflicts. . . . It is true of a union as of an employer that it may be responsible for acts which it has not expressly authorized or which might not be attributable to it on strict application of the rules of *respondet superior*. . . . A state may withdraw the injunction from labor



controversies, but no less certainly the Fourteenth Amendment does not make unconstitutional the use of the injunction as a means of restricting violence. We find nothing in the Fourteenth Amendment that prevents a state if it so chooses from placing confidence in a chancellor's decree and compels it to rely exclusively on a policeman's club.

. . . . .

To maintain the balance of our federal system, in so far as it is committed to our care, demands at once zealous regard for the guarantees of the Bill of Rights and due recognition of the powers belonging to the states. Such an adjustment requires austere judgment, and a precise summary of the result may help to avoid misconstruction.

(1) We do not qualify the Thornhill and Carlson decisions. We reaffirm them. They involved statutes baldly forbidding all picketing near an employer's place of business. Entanglement with violence was expressly out of those cases. The statutes had to be dealt with on their face, and therefore we struck them down. Such an unlimited ban on free communication declared as the law of a state by a state court enjoys no greater protection here. . . . But just as a state through its legislature may deal with specific circumstances menacing the peace by an appropriately drawn act, . . . so the law of a state may be fitted to a concrete situation through the authority given by the state to its courts. This is precisely the kind of situation which the Thornhill opinion excluded from its scope. "We are not now concerned with picketing *en masse* or otherwise conducted which might occasion such imminent and aggravated danger . . . as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger." 310 U.S. 105.(\*) We would not strike down a statute which authorized the courts of Illinois to prohibit picketing when they should find that violence had given to the picketing a coercive effect whereby it would operate destructively as force and intimidation. Such a situation is presented by this record. It distorts the meaning of things to generalize the terms of an injunction derived from and directed towards violent misconduct as though it were an abstract prohibition of all picketing wholly unrelated to the violence involved.

(2) The exercise of the state's power which we are sustaining is the very antithesis of a ban on all discussion in Chicago of a matter of public importance. Of course we would not sustain such a ban. The injunction is confined to conduct near stores dealing in respondent's milk, and it deals with this narrow area precisely because the coercive conduct affected it. An injunction so adjusted to a particular situation is in accord with the settled practice of equity . . . Such an injunction must be read in the context of its circumstances. Nor ought state action be held unconstitutional by interpreting the law of the state as though, to use a phrase of Mr. Justice Holmes, one were fired with a zeal to pervert. If an appropriate injunction were put to abnormal uses in its enforcement, so that encroachments were made on free discussion outside the limits of violence, as for instance discussion through newspapers or on the radio, the doors of this Court are always open.

(3) The injunction which we sustain is "permanent" only for the temporary period for which it may last. It is justified only by the violence that induced it and only so long as it counteracts a continuing intimidation. Familiar equity procedure assures opportunity for modifying or vacating an injunction when its continuance is no longer warranted. Here again, the state courts have not the last say. They must act in subordination to the duty of this Court to enforce constitutional liberties even when denied through spurious findings of fact in a state court. . . .

(4) A final word. Freedom of speech and freedom of the press cannot be too often invoked as basic to our scheme of society. But these liberties will not be advanced or even maintained by denying to the states with all their resources, including the instrumentality of their courts, the power to deal with coercion due to extensive violence. If the people of Illinois desire to withdraw the use of the injunction in labor controversies, the democratic process for legislative reform is at their disposal. On the other hand, if they choose to leave their courts with the power which they have historically exercised, within the circumscribed limits which this opinion defines, and we deny them that instrument of government, that power has been taken from them permanently. Just because these industrial conflicts raise anxious difficulties, it is most important for us not to intrude into the realm of policy-making by reading our own notions into the Constitution.

## "CONFINING THE AREA OF UNRESTRICTED INDUSTRIAL WARFARE"

*Carpenters & Joiners Union of America v. Ritter's Cafe*

315 U.S. 722 (1942)

On the ground that the picketing was in violation of the state's anti-trust laws, a Texas court enjoined union carpenters and painters from picketing a restaurant whose owner had arranged with a non-union contractor to erect a building a mile and a half away from the restaurant, and which was in no way connected with his restaurant business. There was no violence. The banners informed the public that the owner of the cafe had awarded a contract to a builder who was unfair to organized labor.

The Court, through Justice Frankfurter, affirmed the decree, holding that a state does not infringe freedom of speech when it restricts the right to picket to industrial situations in which there is an economic "interdependence" between the business and the picketers: "Recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute."

Unable to agree that the controversy concerned only the union and the non-union contractor, Justice Black dissented, contending that since the picketing was peaceful and the banners told the truth, observance of the principle established in the *Thornhill* case should make the Court hold that the decree was restricting freedom of expression. He said: "Whether members or non-members of the building trades unions are employed is known to depend to a large extent upon the attitude of building contractors. Their attitude can be greatly influenced by those with whom they do business. Disputes between one or two unions and one contractor over the merits and justice of union as opposed to non-union systems of employment are but a part of the nationwide controversy over the subject. I can see no reason why members of the public should be deprived of any opportunity to get information which might enable them to use their influence to tip the scales in favor of the side they think is right." Justices Douglas and Murphy joined in this dissent.

In a separate dissenting opinion, Mr. Justice Reed questioned the adequacy of the test employed by the majority: "The philosophy behind the conclusion of the Court in this case gives to a state the right to bar from picket lines workers who are not a part of the industry picketed. We are not told whether the test of eligibility to picket is to be applied by crafts or enterprises, or how we are to determine economic interde-

pendence or the boundaries of particular industries. . . . The decision withdraws federal constitutional protection from the freedom of workers outside an industry to state their side of a labor controversy by picketing. So long as civil government is able to function normally for the protection of its citizens, such a limitation upon free speech is unwarranted."

It may be of interest to note that Justice Frankfurter has written opinions for the Court reversing state court decrees seeking to limit picketing by labor unions to situations in which the controversy is between the employer and his own employees. See *American Federation of Labor v. Swing*, 312 U.S. 321 (1941), and *Cafeteria Employees Union v. Angelos*, 320 U.S. 293 (1943). Both cases were disposed of on the basis of the principle that "A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him." (The quoted words are from his opinion in the *Swing* case, written a year before the *Ritter's Cafe* case was decided.) Justice Frankfurter's view, then, seems to be that since a state may protect the community against the consequences of economic conflict, it is free to restrict even peaceful picketing by confining it to industrially related disputes.

Mr. Justice Frankfurter's opinion for the Court in *Carpenters & Joiners Union of America v. Ritter's Cafe* read in part:

The facts of this case are simple. Ritter, the respondent, made an agreement with a contractor named Plaster for the construction of a building at 2810 Broadway, Houston, Texas. The contract gave Plaster the right to make his own arrangements regarding the employment of labor in the construction of the building. He employed non-union carpenters and painters. The respondent was also the owner of Ritter's Cafe, a restaurant at 418 Broadway, a mile and a half away. So far as the record discloses, the new building was wholly unconnected with the business of Ritter's Cafe. All of the restaurant employees were members of the Hotel and Restaurant Employees International Alliance, Local 808. As to their restaurant work, there was no controversy between Ritter and his employees or their union. Nor did the carpenters' and painters' unions, the petitioners here, have any quarrel with Ritter over his operation of the restaurant. No construction work of any kind was performed at the restaurant, and no carpenters or painters were employed there.

But because Plaster employed non-union labor, members of the

carpenters' and painters' unions began to picket Ritter's Café immediately after the construction got under way. Walking back and forth in front of the restaurant, a picket carried a placard which read: "This Place is Unfair to Carpenters and Joiners Union of America, Local No. 213, and Painters Local No. 130, Affiliated with American Federation of Labor." Later on, the wording was changed as follows: "The Owner of This Cafe Has Awarded a Contract to Erect a Building to W. A. Plaster Who is Unfair to the Carpenters Union 213 and Painter Union 130, Affiliated with the American Federation of Labor." According to the undisputed finding of the Texas courts, which is controlling here, Ritter's Cafe was picketed "for the avowed purpose of forcing and compelling plaintiff [Ritter] to require the said contractor, Plaster, to use and employ only members of the defendant unions on the building under construction in the 2800 block on Broadway." Contemporaneously with this picketing, the restaurant workers' union, Local No. 808, called Ritter's employees out on strike and withdrew the union card from his establishment. Union truck drivers refused to cross the picket line to deliver food and other supplies to the restaurant. The effect of all this was "to prevent members of all trades-unions from patronizing plaintiff's cafe and to erect a barrier around plaintiff's cafe, across which no member of defendant-unions or an affiliate will go." A curtailment of sixty per cent of Ritter's business resulted.

Holding the petitioners' activities to constitute a violation of the state anti-trust law, . . . the Texas Court of Civil Appeals enjoined them from picketing Ritter's Cafe. The decree forbade neither picketing elsewhere (including the building under construction by Plaster) nor communication of the facts of the dispute by any means other than the picketing of Ritter's restaurant. . . .

The economic contest between employer and employee has never concerned merely the immediate disputants. The clash of such conflicting interests inevitably implicates the well-being of the community. Society has therefore been compelled to throw its weight into the contest. The law has undertaken to balance the effort of the employer to carry on his business free from the interference of others against the effort of labor to further its economic self-interest. And every intervention of government in this struggle has in some respect abridged the freedom of action of one or the other or both.

The task of mediating between these competing interests has,

until recently, been left largely to judicial lawmaking and not to legislation. . . . The right of the state to determine whether the common interest is best served by imposing some restrictions upon the use of weapons for inflicting economic injury in the struggle of conflicting industrial forces has not previously been doubted. . . . But the petitioners now claim that there is to be found in the Due Process Clause of the Fourteenth Amendment a constitutional command that peaceful picketing must be wholly immune from regulation by the community in order to protect the general interest, that the states must be powerless to confine the use of this industrial weapon within reasonable bounds.

The constitutional right to communicate peaceably to the public the facts of a legitimate dispute is not lost merely because a labor dispute is involved, . . . or because the communication takes the form of picketing, even when the communication does not concern a dispute between an employer and those directly employed by him. . . . But the circumstance that a labor dispute is the occasion of exercising freedom of expression does not give that freedom any greater constitutional sanction or render it completely inviolable. Where, as here, claims on behalf of free speech are met with claims on behalf of the authority of the state to impose reasonable regulations for the protection of the community as a whole, the duty of this Court is plain. Whenever state action is challenged as a denial of "liberty," the question always is whether the state has violated "the essential attributes of that liberty." Mr. Chief Justice Hughes in *Near v. Minnesota*, 283 U.S. 697, 708. While the right of free speech is embodied in the liberty safeguarded by the Due Process Clause, that Clause postulates the authority of the states to translate into law local policies "to promote the health, safety, morals and general welfare of its people. . . . The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise." *Ibid.*, at 707. "The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side." *Hudson Water Co. v. McCarter*, 209 U.S. 349, 355.

In the circumstances of the case before us, Texas has declared that its general welfare would not be served if, in a controversy

between a contractor and building worker's unions, the unions were permitted to bring to bear the full weight of familiar weapons of industrial combat against a restaurant business, which, as a business, has no nexus with the building dispute but which happens to be owned by a person who contracts with the builder. The precise question is, therefore, whether the Fourteenth Amendment prohibits Texas from drawing this line in confining the area of unrestricted industrial warfare.

Texas has undertaken to localize industrial conflict by prohibiting the exertion of concerted pressure directed at the business, wholly outside the economic context of the real dispute, of a person whose relation to the dispute arises from his business dealings with one of the disputants. The state has not attempted to outlaw whatever psychological pressure may be involved in the mere communication by an individual of the facts relating to his differences with another. Nor are we confronted here with a limitation upon speech in circumstances where there exists an "interdependence of economic interest of all engaged in the same industry." *American Federation of Labor v. Swing*, 312 U.S. 321, 326. . . . The line drawn by Texas in this case is not the line drawn by New York in the *Wohl* case. [*Bakery Drivers Local v. Wohl*, 315 U.S. 769.] The dispute there related to the conditions under which bakery products were sold and delivered to retailers. The business of the retailers was therefore directly involved in the dispute. In picketing the retail establishments, the union members would only be following the subject-matter of their dispute. Here we have a different situation. The dispute concerns the labor conditions surrounding the construction of a building by a contractor. Texas has deemed it desirable to insulate from the dispute an establishment which industrially has no connection with the dispute. Texas has not attempted to protect other business enterprises of the building contractor, Plaster, who is the petitioners' real adversary. We need not therefore consider problems that would arise if Texas had undertaken to draw such a line.

It is true that by peaceful picketing workingmen communicate their grievances. As a means of communicating the facts of a labor dispute, peaceful picketing may be a phase of the constitutional right of free utterance. But recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly

related to the dispute. Restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication. To deny to the states the power to draw this line is to write into the Constitution the notion that every instance of peaceful picketing—anywhere and under any circumstances—is necessarily a phase of the controversy which provoked the picketing. Such a view of the Due Process Clause would compel the states to allow the disputants in a particular industrial episode to conscript neutrals having no relation to either the dispute or the industry in which it arose.

In forbidding such conscription of neutrals, in the circumstances of the case before us, Texas represents the prevailing, and probably the unanimous, policy of the states. (\*) We hold that the Constitution does not forbid Texas to draw the line which has been drawn here. To hold otherwise would be to transmute vital constitutional liberties into doctrinaire dogma. We must be mindful that “the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants.” *Thornhill v. Alabama*, 310 U.S. 88, 103-04.

It is not for us to assess the wisdom of the policy underlying the law of Texas. Our duty is at an end when we find that the Fourteenth Amendment does not deny her the power to enact that policy into law.

#### IMPARTIAL JUSTICE AND “TRIAL BY NEWSPAPERS”

##### *Bridges v. California*

314 U.S. 252, 279 (1941)

This case was decided together with *Times-Mirror Co. v. Superior Court of California*. The decision in both cases was by a vote of five to four. The contempt of court action against the publisher of the *Los Angeles Times* and its managing editor grew out of editorials commenting upon a pending case—after conviction but before sentence. The action against Harry Bridges grew out of a telegram he had sent to Secretary of Labor Perkins concerning pending litigation which involved a dispute be-



tween the C. I. O. union of which he was president and a rival A.F. of L. union.

The editorials in question dealt with the prosecution of two union members who had previously been convicted of assaulting non-union truck drivers. After they were convicted but before the judge pronounced sentence, an editorial in the *Times* captioned "Probation for Gorillas?" ended with the admonition: "Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill." The publisher and editor were convicted for contempt of court, on the ground that the editorial in question had an "inherent" or "reasonable" tendency to interfere with the orderly administration of justice.

While a motion for a new trial was pending in the case arising out of the controversy between the International Longshoremen's and Warehousemen's Union and the International Longshoremen's Association, Bridges released to the press a telegram which he had dispatched to the Secretary of Labor referring to the judge's decision as "outrageous" and saying that any attempt to enforce it would tie up the port of Los Angeles and indeed the entire west coast. The telegram informed the Secretary that the union did not "intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board."

Mr. Justice Black spoke for the Court in reversing the convictions for contempt. To justify a restriction of free expression, it is not enough that a publication has an "inherent" or "reasonable" tendency to obstruct justice: "The substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished." Viewed in the light of this test, the possibility that the publications would actually interfere with the course of justice was rather remote. So far as the offending editorial was concerned, it said nothing which was not already known to all who were familiar with the paper's militant anti-labor attitude. The telegram sent by Bridges merely intimated that if the court decree were enforced a strike might ensue, a contingency of which the judge was not unaware: "if there was electricity in the atmosphere, it was generated by the facts" and not by the telegram. "Experience shows," wrote Justice Black, "that the more acute labor controversies are, the more likely it is that in some aspect they will get into court. It is therefore the controversies that command most interest that the decisions below would remove from the arena of public discussion."

Mr. Justice Frankfurter dissented and was joined by Chief Justice Stone and Justices Roberts and Byrnes. His chief quarrel with the major-

ity was that they were ignoring the serious threat to the independence of the judiciary inherent in the conduct which led to the contempt actions; fair, fearless and impartial administration of justice could not long continue if powerful elements in the community were free to publicly criticize pending litigation. It should be emphasized, however, that Justice Frankfurter believes that only matters still undecided (but by no means all judicial business) should be insulated against out-of-court pressures. Thus, in a recent case decided on the basis of the ruling in the Bridges case, he voted with the majority in reversing the conviction of the editor and publisher of the *Miami Herald* for printing editorials and a cartoon criticizing certain court actions (already completed) as being too favorable to criminals and gambling establishments. *Pennekamp v. Florida*, 328 U.S. 331 (1946).

Mr. Justice Frankfurter's dissenting opinion in the Bridges case read in part:

. . . . .

That a state may, under appropriate circumstances, prevent interference with specific exercises of the process of impartial adjudication does not mean that its people lose the right to condemn decisions or the judges who render them. Judges as persons, or courts as institutions, are entitled to no greater immunity from criticism than other persons or institutions. Just because the holders of judicial office are identified with the interests of justice they may forget their common human frailties and fallibilities. There have sometimes been martinets upon the bench as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity. Therefore judges must be kept mindful of their limitations and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor however blunt.\* . . . But the Constitution does not bar a state from acting on the theory of our system of justice, that the "conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *Patterson v. Colorado*, 205 U.S. 454, 462. The theory of our system of justice as thus stated for the Court by Mr. Justice Holmes has never been questioned by any member of the Court. . . . That the conventional power to punish for contempt is not a censorship in advance but a punishment for past conduct and, as such, like prosecution for a criminal libel, is

not offensive either to the First or to the Fourteenth Amendments, has never been doubted throughout this Court's history.

This conception of justice, the product of a long and arduous effort in the history of freedom, is one of the greatest achievements of civilization, and is not less to be cherished at a time when it is repudiated and derided by powerful régimes. "The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government." . . . This has nothing to do with curtailing expression of opinion, be it political, economic, or religious, that may be offensive to orthodox views. It has to do with the power of the states to discharge an indispensable function of civilized society, that of adjudicating controversies between its citizens and between citizens and the state through legal tribunals in accordance with their historic procedures. Courts and judges must take their share of the gains and pains of discussion which is unfettered except by laws of libel, by self-restraint, and by good taste. Winds of doctrine should freely blow for the promotion of good and the correction of evil. Nor should restrictions be permitted that cramp the feeling of freedom in the use of tongue or pen regardless of the temper or the truth of what may be uttered.

Comment however forthright is one thing. Intimidation with respect to specific matters still in judicial suspense, quite another. . . . A publication intended to teach the judge a lesson, or to vent spleen, or to discredit him, or to influence him in his future conduct, would not justify exercise of the contempt power. . . . It must refer to a matter under consideration and constitute in effect a threat to its impartial disposition. It must be calculated to create an atmospheric pressure incompatible with rational, impartial adjudication. But to interfere with justice it need not succeed. As with other offenses, the state should be able to proscribe attempts that fail because of the danger that attempts may succeed. The purpose, it will do no harm to repeat, is not to protect the court as a mystical entity or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed. The purpose is to protect immediate litigants and the public from the mischievous danger of an unfree or coerced tribunal. The power should be invoked only where the adjudicatory process may be hampered or hindered in its calm, de-

tached, and fearless discharge of its duty on the basis of what has been submitted in court. The belief that decisions are so reached is the source of the confidence on which law ultimately rests.

It will not do to argue that a state cannot permit its judges to resist coercive interference with their work in hand because other officials of government must endure such obstructions. In such matters "a page of history is worth a volume of logic." . . . Presidents and governors and legislators are political officials traditionally subject to political influence and the rough and tumble of the hustings, who have open to them traditional means of self-defense. In a very immediate sense, legislators and executives express the popular will. But judges do not express the popular will in any ordinary meaning of the term. The limited power to punish for contempt which is here involved wholly rejects any assumption that judges are superior to other officials. They merely exercise a function historically and intrinsically different. From that difference is drawn the power which has behind it the authority and the wisdom of our whole history. Because the function of judges and that of other officials in special situations may approach similarity, hard cases can be put which logically may contradict the special quality of the judicial process.

We are charged here with the duty, always delicate, of sitting in judgment on state power. We must be fastidiously careful not to make our private views the measure of constitutional authority. To be sure, we are here concerned with an appeal to the great liberties which the Constitution assures to all our people, even against state denial. When a substantial claim of an abridgment of these liberties is advanced, the presumption of validity that belongs to an exercise of state power must not be allowed to impair such a liberty or to check our close examination of the merits of the controversy. But the utmost protection to be accorded to freedom of speech and of the press cannot displace our duty to give due regard also to the state's power to deal with what may essentially be local situations.

Because freedom of public expression alone assures the unfolding of truth, it is indispensable to the democratic process. But even that freedom is not an absolute and is not predetermined. By a doctrinaire overstatement of its scope and by giving it an illusory absolute appearance, there is danger of thwarting the free choice and the responsibility of exercising it which are basic to a democratic society. While we are reviewing a judgment of the California

Supreme Court and not an act of its legislature or the voice of the people of California formally expressed in its constitution, we are in fact passing judgment on "the power of the State as a whole." . . .

. . . . .

The rule of law applied in these cases by the California court forbade publications having "a reasonable tendency to interfere with the orderly administration of justice in pending actions." To deny that this age-old formulation of the prohibition against interference with dispassionate adjudication is properly confined to the substantive evil is not only to turn one's back on history but also to indulge in an idle play on words, unworthy of constitutional adjudication. It was urged before us that the words "reasonable tendency" had a fatal pervasiveness, and that their replacement by "clear and present danger" was required to state a constitutionally permissible rule of law. The Constitution, as we have recently had occasion to remark, is not a formulary. . . . Nor does it require displacement of an historic test by a phrase which first gained currency on March 3, 1919. *Schenck v. United States*, 249 U.S. 47. Our duty is not ended with the recitation of phrases that are the short-hand of a complicated historic process. The phrase "clear and present danger" is merely a justification for curbing utterance where that is warranted by the substantive evil to be prevented. The phrase itself is an expression of tendency and not of accomplishment, and the literary difference between it and "reasonable tendency" is not of constitutional dimension.

Here the substantive evil to be eliminated is interference with impartial adjudication. To determine what interferences may be made the basis for contempt tenders precisely the same kind of issues as that to which the "clear and present danger" test gives rise. "It is a question of proximity and degree." . . . And this, according to Mr. Justice Brandeis "is a rule of reason . . . Like many other rules for human conduct, it can be applied correctly only by the exercise of good judgment." *Schaefer v. United States*, 251 U.S. 466, 482-83. Has California's judgment here undermined liberties protected by the Constitution? In common with other questions of degree, this is to be solved not by short-hand phrases but by consideration of the circumstances of the particular case. One cannot

yell "Fire" in a crowded theater; police officers cannot turn their questioning into an instrument of mental oppression. . . .

If a rule of state law is not confined to the evil which may be dealt with but places an indiscriminate ban on public expression that operates as an overhanging threat to free discussion, it must fall without regard to the facts of the particular case. This is true whether the rule of law be declared in a statute or in a decision of a court . . . In the cases before us there was no blanket or dragnet prohibition of utterance affecting courts. Freedom to criticize their work, to assail generally the institution of courts, to report and comment on matters in litigation but not to subvert the process of deciding—all this freedom was respected. Only the state's interest in calm and orderly decisions, which represented also the constitutional right of the parties, led it to condemn coercive utterances directed towards a pending proceeding. California, speaking through its courts, acted because of their conclusion that such utterances undermined the conditions necessary for fair adjudication.

It is suggested that threats, by discussion, to untrammelled decisions by courts are the most natural expressions when public feeling runs highest. But it does not follow that states are left powerless to prevent their courts from being subverted by outside pressure when the need for impartiality and fair proceeding is greatest. To say that the framers of the Constitution sanctified veiled violence through coercive speech directed against those charged with adjudication is not merely to make violence an ingredient of justice; it mocks the very ideal of justice by respecting its forms while stultifying its uncontaminated exercise.

We turn to the specific cases before us:

The earliest editorial involved in No. 3, "Sit-strikers Convicted," commented upon a case the day after a jury had returned a verdict and the day before the trial judge was to pronounce sentence and hear motions for a new trial and applications for probation. On its face the editorial merely expressed exulting approval of the verdict, a completed action of the court, and there is nothing in the record to give it additional significance. The same is true of the second editorial, "Fall of an Ex-Queen," which luridly draws a moral from a verdict of guilty in a sordid trial and which was published eight days prior to the day set for imposing sentence. In both instances imposition of sentences was immediately pending at the time of

publication, but in neither case was there any declaration, direct or sly, in regard to this. As the special guardian of the Bill of Rights, this Court is under the heaviest responsibility to safeguard the liberties guaranteed from any encroachment, however astutely disguised. The Due Process Clause of the Fourteenth Amendment protects the right to comment on a judicial proceeding, so long as this is not done in a manner interfering with the impartial disposition of a litigation. There is no indication that more was done in these editorials; they were not close threats to the judicial function which a state should be able to restrain. We agree that the judgment of the state court in this regard should not stand.

"Probation for Gorillas?", the third editorial, is a different matter. On April 22, 1938, a Los Angeles jury found two defendants guilty of assault with a deadly weapon and of a conspiracy to violate another section of the penal code. On May 2nd, the defendants applied for probation and the trial judge on the same day set June 7th as the day for disposing of this application and for sentencing the defendants. In the Los Angeles Times for May 5th appeared the following editorial entitled "Probation for Gorillas?":

"Two members of Dave Beck's wrecking crew, entertainment committee, goon squad or gorillas, having been convicted in Superior Court of assaulting nonunion truck drivers, have asked for probation. Presumably they will say they are 'first offenders,' or plead that they were merely indulging a playful exuberance when, with sling-shots, they fired steel missiles at men whose only offense was wishing to work for a living without paying tribute to the erstwhile boss of Seattle.

"Sluggers for pay, like murderers for profit, are in a slightly different category from ordinary criminals. Men who commit mayhem for wages are not merely violators of the peace and dignity of the State; they are also conspirators against it. The man who burgles because his children are hungry may have some claim on public sympathy. He whose crime is one of impulse may be entitled to lenity. But he who hires out his muscles for the creation of disorder and in aid of a racket is a deliberate foe of organized society and should be penalized accordingly.

"It will teach no lesson to other thugs to put these men on good behavior for a limited time. Their 'duty' would simply be taken over by others like them. If Beck's thugs, however, are made to realize

that they face San Quentin when they are caught, it will tend to make their disreputable occupation unpopular. Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill."

This editorial was published three days after the trial judge had fixed the time for sentencing and for passing on an application for probation, and a month prior to the date set. It consisted of a sustained attack on the defendants, with an explicit demand of the judge that they be denied probation and be sent "to the jute mill." This meant, in California idiom, that in the exercise of his discretion the judge should treat the offense as a felony, with all its dire consequences, and not as a misdemeanor. Under the California Penal Code the trial judge had wide discretion in sentencing the defendants: he could sentence them to the county jail for one year or less, or to the state penitentiary for two years. The editorial demanded that he take the latter alternative and send the defendants to the "jute mill" of the state penitentiary. A powerful newspaper admonished a judge, who within a year would have to secure popular approval if he desired continuance in office, that failure to comply with its demands would be "a serious mistake." Clearly, the state court was justified in treating this as a threat to impartial adjudication. It is too naïve to suggest that the editorial was written with a feeling of impotence and an intention to utter idle words. The publication of the editorial was hardly an exercise in futility. If it is true of juries it is not wholly untrue of judges that they too may be "impregnated by the environing atmosphere." Mr. Justice Holmes in *Frank v. Mangum*, 237 U.S. 309, 349. California should not be denied the right to free its courts from such coercive, extraneous influences; it can thus assure its citizens of their constitutional right of a fair trial. Here there was a real and substantial manifestation of an endeavor to exert outside influence. A powerful newspaper brought its full coercive power to bear in demanding a particular sentence. If such sentence had been imposed, readers might assume that the court had been influenced in its action; if lesser punishment had been imposed, at least a portion of the community might be stirred to resentment. It cannot be denied that even a judge may be affected by such a quandary. We cannot say that the state court was out of bounds in concluding that such conduct offends the free course of justice. Comment after the imposition of sentence—criti-



cism, however unrestrained, of its severity or lenience or disparity . . . —is an exercise of the right of free discussion. But to deny the states power to check a serious attempt at dictating, from without, the sentence to be imposed in a pending case, is to deny the right to impartial justice as it was cherished by the founders of the Republic and by the framers of the Fourteenth Amendment. It would erect into a constitutional right, opportunities for abuse of utterance interfering with the dispassionate exercise of the judicial function.

. . .

In *No. 1*, Harry R. Bridges challenges a judgment by the Superior Court of California fining him \$125 for contempt. He was president of the International Longshoremen's and Warehousemen's Union, an affiliate of the Committee for Industrial Organization, and also West Coast director for the C.I.O. The I.L.W.U. was largely composed of men who had withdrawn from the International Longshoremen's Association, an affiliate of the American Federation of Labor. In the fall of 1937 the rival longshoremen's unions were struggling for control of a local in San Pedro Harbor. The officers of this local, carrying most of its members with them, sought to transfer the allegiance of the local to I.L.W.U. Thereupon, longshoremen remaining in I.L.A. brought suit in the Superior Court of Los Angeles county against the local and its officers. On January 21, 1938, Judge Schmidt, sitting in the Superior Court, enjoined the officers from working on behalf of I.L.W.U. and appointed a receiver to conduct the affairs of the local as an affiliate of the A.F. of L., by taking charge of the outstanding bargaining agreements of the local and of its hiring hall, which is the physical mainstay of such a union. Judge Schmidt promptly stayed enforcement of his decree, and on January 24th the defendants in the injunction suit moved for a new trial and for vacation of the judgment. In view of its local setting, the case aroused great public interest. The waterfront situation on the Pacific Coast was also watched by the United States Department of Labor, and Bridges had been in communication with the Secretary of Labor concerning the difficulties. On the same day that the motion for new trial was filed, Bridges sent the Secretary the following wire concerning Judge Schmidt's decree:

"This decision is outrageous considering I.L.A. has 15 members [in San Pedro] and the International Longshoremen-Warehousemen's Union has 3,000. International Longshoremen-Warehousemen

Union has petitioned the Labor Board for certification to represent San Pedro longshoremen with International Longshoremen Association denied representation because it represents only 15 men. Board hearing held; decision now pending. Attempted enforcement of Schmidt decision will tie up port of Los Angeles and involve entire Pacific Coast. International Longshoremen-Warehousemen Union, representing over 11,000 of the 12,000 longshoremen on the Pacific Coast, does not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board."

This telegram duly found its way into the metropolitan newspapers of California. Bridges' responsibility for its publication is clear. His publication of the telegram in the Los Angeles and San Francisco papers is the basis of Bridges' conviction for contempt.

The publication of the telegram was regarded by the state supreme court as "a threat that if an attempt was made to enforce the decision, the ports of the entire Pacific Coast would be tied up" and "a direct challenge to the court that 11,000 longshoremen on the Pacific Coast would not abide by its decision." This occurred immediately after counsel had moved to set aside the judgment which was criticized, so unquestionably there was a threat to litigation obviously alive. It would be inadmissible dogmatism for us to say that in the context of the immediate case—the issues at stake, the environment in which the judge, the petitioner and the community were moving, the publication here made, at the time and in the manner it was made—this could not have dominated the mind of the judge before whom the matter was pending. Here too the state court's judgment should not be overturned.

The fact that the communication to the Secretary of Labor may have been privileged does not constitutionally protect whatever extraneous use may have been made of the communication. It is said that the possibility of a strike, in case of an adverse ruling, must in any event have suggested itself to the private thoughts of a sophisticated judge. Therefore the publication of the Bridges telegram, we are told, merely gave that possibility public expression. To afford constitutional shelter for a definite attempt at coercing a court into a favorable decision because of the contingencies of frustration to which all judicial action is subject, is to hold, in effect, that the

Constitution subordinates the judicial settlement of conflicts to the unfettered indulgence of violent speech. The mere fact that after an unfavorable decision men may, upon full consideration of their responsibilities as well as their rights, engage in a strike or a lockout, is a poor reason for denying a state the power to protect its courts from being bludgeoned by serious threats while a decision is hanging in the judicial balance. A vague, undetermined possibility that a decision of a court may lead to a serious manifestation of protest is one thing. The impact of a definite threat of action to prevent a decision is a wholly different matter. To deny such realities is to stultify law. Rights must be judged in their context and not *in vacuo*. . . .

The question concerning the narrow power we recognize always is—was there a real and substantial threat to the impartial decision by a court of a case actively pending before it? The threat must be close and direct; it must be directed towards a particular litigation. The litigation must be immediately pending. When a case is pending is not a technical, lawyer's problem, but is to be determined by the substantial realities of the specific situation. (\*) Danger of unbridled exercise of judicial power because of immunity from speech which is coercing is a figment of groundless fears. In addition to the internal censor of conscience, professional standards, the judgment of fellow judges and the bar, the popular judgment exercised in elections, the power of appellate courts, including this Court, there is the corrective power of the press and of public comment free to assert itself fully immediately upon completion of judicial conduct. Because courts, like other agencies, may at times exercise power arbitrarily and have done so, resort to this Court is open to determine whether, under the guise of protecting impartiality in specific litigation, encroachments have been made upon the liberties of speech and press. But instances of past arbitrariness afford no justification for reversing the course of history and denying the states power to continue to use time-honored safeguards to assure unbulied adjudications. All experience justifies the states in acting upon the conviction that a wrong decision in a particular case may best be forestalled or corrected by more rational means than coercive intrusion from outside the judicial process.

Since courts, although representing the law, . . . are also sitting in judgment, as it were, on their own function in exercising their

power to punish for contempt, it should be used only in flagrant cases and with the utmost forbearance. It is always better to err on the side of tolerance and even of disdainful indifference.

No objections were made before us to the procedure by which the charges of contempt were tried. But it is proper to point out that neither case was tried by a judge who had participated in the trials to which the publications referred. . . . So it is clear that a disinterested tribunal was furnished, and since the Constitution does not require a state to furnish jury trials, . . . and states have discretion in fashioning criminal remedies, . . . the situation here is the same as though a state had made it a crime to publish utterance having a "reasonable tendency to interfere with the orderly administration of justice in pending actions," and not dissimilar from what the United States has done in §135 of the Criminal Code. (\*)

#### "FREEDOM TO SPEAK FOOLISHLY AND WITHOUT MODERATION"

*Baumgartner v. United States*

322 U.S. 665 (1944)

A provision of the Naturalization Act of 1906, now Section 338 of the Nationality Act of 1940, authorizes proceedings to set aside naturalization decrees and to cancel certificates of citizenship on a showing that such citizenship was procured illegally or by fraud. Acting under this provision, the government has in recent years sought to denaturalize naturalized citizens known to have extreme political views. The contention has been that no alien believing in Communism or Nazism could at the same time have told the truth when he swore in the petition for naturalization that he was "attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same."

However, in the now well known *Schneiderman* case, decided in 1943, the Supreme Court ruled that mere membership in the Communist party at the time of naturalization did not in itself prove that citizenship had been procured illegally. 320 U.S. 118. *Schneiderman* was an active member of the Communist party at the time he received his citizenship. But a majority of the Court felt that the government failed to show that *Schneiderman* personally did not believe in the principles

of the Constitution or that he personally advocated the overthrow of the government by violence. The proof must be "clear, unequivocal, and convincing." Justice Frankfurter joined Chief Justice Stone and Justice Roberts in dissent.

In the Baumgartner case, the "exacting standard" of proof enunciated by Justice Murphy in the *Schneiderman* case was applied for the benefit of one whose pronounced Nazi sympathies led to denaturalization proceedings against him. Baumgartner secured citizenship in 1932, and the action to cancel it was brought ten years later. There was evidence that beginning about 1933 Baumgartner expressed admiration for Hitler and his exploits and spoke disparagingly of our country and its leaders. But the Supreme Court held that the evidence was insufficient to sustain the charge that at the time of his admission to citizenship Baumgartner did not truly and fully renounce his foreign allegiance and did not in fact intend to support the Constitution and laws of the United States. Of particular interest and significance is the Court's vindication of the principle that the right to criticize the government is as great for naturalized citizens as for native-born Americans.

Mr. Justice Frankfurter spoke for a unanimous Court in the Baumgartner case:

. . . . .  
As a condition to receiving his American citizenship, Baumgartner, like every other alien applying for that great gift, was required to declare on oath that he renounced his former allegiance, in this case to the German Reich, and that he would "support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic," and that he would "bear true faith and allegiance to the same." That he did not truly and fully renounce his allegiance to Germany and that he did not in fact intend to support the Constitution and laws of the United States and to give them true faith and allegiance, are the charges of fraud and illegality on which his citizenship is claimed forfeit.

As is true of the determination of all issues of falsity and fraud, the case depends on its own particular facts. But the division of opinion among the judges below makes manifest that facts do not assess themselves and that the decisive element is the attitude appropriate for judgment of the facts in a case like this. The two lower courts have sustained the Government's claim that expressions by Baumgartner, in conversations with others and in the

soliloquies of a diary, showed that he consciously withheld complete renunciation of his allegiance to Germany and entertained reservations in his oath of allegiance to this country, its Constitution and its laws. . . .

Baumgartner was born in Kiel, Germany, on January 20, 1895, and brought up in modestly comfortable circumstances. He received a classical high-school education, which he completed in time to enter the German army in 1914. He was commissioned a second lieutenant in 1917, and shortly thereafter he was captured by the British and confined in England until November, 1919. Upon his return to Germany, Baumgartner studied at the University of Darmstadt, from which he was graduated in 1925 as an electrical engineer. Thereupon he was employed by a public utility company until January, 1927, when he left for the United States. Shortly before, Baumgartner had married, and his wife followed him to this country later in the same year.

For about three months, Baumgartner stayed with friends in Illinois, and then came to Kansas City, Missouri, where he was employed by the Kansas City Power and Light Company. He continued in its employ down to the time of this suit. The man to whom he reported to work testified that after about two days on the job, Baumgartner began to discuss the political scene in Germany, to express a lack of enthusiasm for the then German Government, and to extol the virtues of Hitler and his movement. Baumgartner spoke so persistently about the superiority of German people, the German schools, and the engineering work of the Germans, that he aroused antagonism among his co-workers and was transferred to a different section of the plant.

There was testimony that in 1933 or 1934 Mrs. Baumgartner's mother visited this country, and that after this visit, Baumgartner, beginning in 1934, "praised the work that Hitler was doing over there in bringing Germany back, on repeated occasions." Evidence of statements made by Baumgartner over a period of about seven years beginning in 1933 indicated oft-repeated admiration for the Nazi Government, comparisons between President Roosevelt and Adolf Hitler which led to conclusions that this country would be better off if run as Hitler ran Germany, "that regimentation, as the Nazis, formed it [*sic*] was superior to the democracy," and that "the democracy of the United States was a practical farce." One witness

of German extraction testified that Baumgartner told him he was "a traitor to my country" because of the witness's condemnation of Hitler. Baumgartner made public speeches on at least three occasions before businessmen's groups, clubs, and the like, in which he told of the accomplishments of the Nazi Government and indicated that "he would be glad to live under the regime of Hitler."

During 1937 and 1938, Baumgartner conducted a Sunday school class, and former students testified that the discussion in class turned to Germany very frequently, that Baumgartner indicated that his students could get a fairer picture of conditions in Germany from the German radio, and that Germany was justified in much of what it was doing. The school superintendent also testified that he had received complaints that Baumgartner was preaching Nazism.

In 1938 Baumgartner resigned from the Country Club Congregational Church in Kansas City because he objected to the injection of politics into the sermons. In May of the next year his wife and their three children, who had been born in Kansas City, went to Germany to visit Mrs. Baumgartner's parents. One witness testified that Baumgartner explained this trip in part by saying that "he wanted the children to be brought up in German schools," and when war broke out in September, 1939, Mrs. Baumgartner cabled for money to return but Baumgartner could not raise the necessary funds and felt that his family would be as safe in Germany as here. Baumgartner remarked that he wanted his wife to come back from Germany, when she did, on a German boat. One of Baumgartner's neighbor's testified that in a conversation in December, 1939, Baumgartner, asked about his thirteen-year-old daughter then in Germany, said sarcastically: "Edith has done a very un-American thing, she has joined the Nazi Youth Movement."

There was testimony that Baumgartner justified the German invasions in the late 1930's, and announced, when Dunkerque fell, that "Today I am rejoicing." One witness testified that Baumgartner told him that he "belonged to an order called the so-called 'Bund,'" and the diary which Baumgartner kept from December 1, 1938, to the summer of 1941 reveals that he attended a meeting of the German Vocational League where the German national anthem was sung and "everyone naturally arose and assumed the usual German stance with the arm extended to give the National Socialist greeting." Other diary entries reflect violent anti-Semitism, impatience at the

lack of pro-German militancy of German-Americans, and approval of Germans who have not "been Americanized, that is, ruined."(\*) Finally, Baumgartner replied in the affirmative to the trial judge's question: "Was your attitude towards the principles of the American government in 1932 when you took the oath the same as it has been ever since?"

. . . . .

The gravamen of the Government's complaint and of the findings and opinions below is that Baumgartner consciously withheld allegiance to the United States and its Constitution and laws; in short, that Baumgartner was guilty of fraud. To prove such intentional misrepresentation evidence calculated to establish only the objective falsity of Baumgartner's oath was adduced. Nothing else was offered to show that Baumgartner was aware of a conflict between his views and the new political allegiance he assumed. But even if objective falsity as against perjurious falsity of the oath is to be deemed sufficient under §338 (a) of the Nationality Act of 1940 to revoke an admission to citizenship, it is our view that the evidence does not measure up to the standard of proof which must be applied to this case.

We come then to a consideration of the evidence in the context in which that evidence is to be judged. Congress alone has been entrusted by the Constitution with the power to give or withhold naturalization and to that end "to establish a uniform Rule of Naturalization." . . . In exercising its power, Congress has authorized the courts to grant American citizenship only if the alien has satisfied the conditions imposed by Congress for naturalization. There is no "right to naturalization unless all statutory requirements are complied with." . . . And so "If a certificate is procured when the prescribed qualifications have no existence in fact, it may be cancelled by suit." . . . From the earliest days of the Republic, Congress has required as a condition of citizenship that the alien renounce his foreign allegiance and swear allegiance to this country and its Constitution. Act of January 29, 1795 . . . By this requirement Congress has not used meaningless words. Nor, on the other hand, has it thereby expressed a narrow test or formula susceptible of almost mechanical proof, as is true of other prerequisites for naturalization—period of residence, documentation of arrival, requi-



site number of sponsoring witnesses and the like. Allegiance to this Government and its laws, is a compendious phrase to describe those political and legal institutions that are the enduring features of American political society. We are here dealing with a test expressing a broad conception—a breadth appropriate to the nature of the subject matter, being nothing less than the bonds that tie Americans together in devotion to a common fealty. . . .

To ascertain fulfilment of a test implying so expansive a reach presents difficult and doubtful problems even for judges presumably well-trained in the meaning of our country's institutions and their demands from its citizens. "Under our Constitution, a naturalized citizen stands on an equal footing with the native citizen in all respects, save that of eligibility to the Presidency." . . . One of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation. Our trust in the good sense of the people on deliberate reflection goes deep. For such is the contradictoriness of the human mind that the expression of views which may collide with cherished American ideals does not necessarily prove want of devotion to the Nation. It would be foolish to deny that even blatant intolerance toward some of the presuppositions of the democratic faith may not imply rooted disbelief in our system of government.

Forswearing past political allegiance without reservation and full assumption of the obligations of American citizenship are not at all inconsistent with cultural feelings imbedded in childhood and youth.(\* ) And during a period when new strength of the land of one's nativity was flamboyantly exploited before its full sinister meaning had been adequately revealed even to some Americans of the oldest lineage, such old cultural loyalty, it is well known, was stimulated into confusion of mind and sometimes to expressions of offensive exuberance.

The denial of application for citizenship because the judicial mind has not been satisfied that the test of allegiance has been met, presents a problem very different from the revocation of the naturalization certificate once admission to the community of American citizenship has been decreed. No doubt the statutory procedure for naturalization . . . and §338, with which we are here concerned, "were designed to afford cumulative protection against fraudulent

or illegal naturalization." . . . But relaxation in the vigor appropriate for scrutinizing the intensity of the allegiance to this country embraced by an applicant before admitting him to citizenship is not to be corrected by meagre standards for disproving such allegiance retrospectively. New relations and new interests flow, once citizenship has been granted. All that should not be undone unless the proof is compelling that that which was granted was obtained in defiance of Congressional authority. Non-fulfilment of specific conditions, like time of residence or the required number of supporting witnesses, are easily established, and when established leave no room for discretion because Congress has left no area of discretion. But where the claim of "illegality" really involves issues of belief or fraud, proof is treacherous and objective judgment, even by the most disciplined minds, precarious. That is why denaturalization on this score calls for weighty proof, especially when the proof of a false or fraudulent oath rests predominantly not upon contemporaneous evidence but is established by later expressions of opinion argumentatively projected, and often through the distorting and self-deluding medium of memory, to an earlier year when qualifications for citizenship were claimed, tested and adjudicated.

It is idle to try to capture and confine the spirit of this requirement of proof within any fixed form of words. The exercise of our judgment is of course not at large. We are fully mindful that due observance of the law governing the grant of citizenship to aliens touches the very well-being of the Nation. Nothing that we are now deciding is intended to weaken in the slightest the alertness with which admission to American citizenship should be safeguarded. But we must be equally watchful that citizenship once bestowed should not be in jeopardy nor in fear of exercising its American freedom through a too easy finding that citizenship was disloyally acquired. We have sufficiently indicated the considerations of policy, derived from the traditions of our people, that require solid proof that citizenship was falsely and fraudulently procured. These considerations must guide our judicial judgment. Nor can the duty of exercising a judgment be evaded by the illusory definiteness of any formula.

The insufficiency of the evidence to show that Baumgartner did not renounce his allegiance to Germany in 1932 need not be labored. Whatever German political leanings Baumgartner had in 1932, they

were to Hitler and Hitlerism, certainly not to the Weimar Republic. Hitler did not come to power until after Baumgartner forswore his allegiance to the then German nation.

Views attributed to Baumgartner as to the superiority of German people, schools, engineering techniques, and the virtues of Hitler, expressed in 1927, when he began to work in Kansas City, are the only direct evidence introduced to show that before he was naturalized in 1932, his attitude precluded his truly or honestly taking an oath of allegiance to the United States, its Constitution and its laws. And his statement at the trial that his attitude towards the principles of the American Government was the same in 1932 as it was at the time of the trial, is hardly significant. For Baumgartner professed loyalty at the trial, denied or explained the few disturbing statements attributed to him by others, and reconciled suspicious diary entries in ways that do not preclude the validity of his oath of allegiance. In short, the weakness of the proof as to Baumgartner's state of mind at the time he took the oath of allegiance can be removed, if at all, only by a presumption that disqualifying views expressed after naturalization were accurate representations of his views when he took the oath. The logical validity of such a presumption is at best dubious even were the supporting evidence less rhetorical and more conclusive. Baumgartner was certainly not shown to have been a party Nazi, and there is only the statement of one witness that Baumgartner had told him that he was a member of the Bund, to hint even remotely that Baumgartner was associated with any group for the systematic agitation of Nazi views or views hostile to this Government. On the contrary, Baumgartner's diary, on which the Government mainly relies, reveals that when in 1939 he attended a meeting of the German Vocational League at which the Nazi salute was given, it was apparently his only experience with this group, and he went "Since I wanted to see what sort of an organization this Vocational League was."

And so we conclude that the evidence as to Baumgartner's attitude after 1932 affords insufficient proof that in 1932 he had knowing reservations in forswearing his allegiance to the Weimar Republic and embracing allegiance to this country so as to warrant the infliction of the grave consequences involved in making an alien out of a man ten years after he was admitted to citizenship. The evidence in the record before us is not sufficiently compelling

to require that we penalize a naturalized citizen for the expression of silly or even sinister-sounding views which native-born citizens utter with impunity. . . .

"THE HISTORIC TESTS FOR DETERMINING WHAT IS  
A BILL OF ATTAINDER"

*United States v. Lovett*

328 U.S. 303, 318 (1946)

Early in 1943, Chairman Dies of the House Committee on Un-American Activities recommended that the House stipulate in the appropriation bills then under consideration that no money be used to pay the salaries of the thirty-nine federal employees whom he named as Communists or "fellow travelers." A subcommittee of the Committee on Appropriations looked into the loyalty of nine of the accused persons and exonerated six of them. It reported, however, that Robert Morss Lovett, Secretary of the Virgin Islands, Goodwin B. Watson, and William E. Dodd, Jr.—Watson and Dodd were then working for the Federal Communications Commission—were guilty of "subversive activity" and were unfit to hold public office. The House later attached a rider to the Urgent Deficiency Appropriation Act of 1943 (section 304) providing that no salary or compensation be paid to Lovett, Watson, or Dodd out of any money then or thereafter appropriated, except for services as jurors or members of the armed forces, unless prior to November 15, 1943, they were again appointed by the President with the advice and consent of the Senate. Five times the Senate rejected the rider, and when President Roosevelt signed the bill he stated that he considered the rider to be unconstitutional and would have preferred to veto the measure.

Lovett, Watson, and Dodd remained at their posts beyond November 15 and then sued in the Court of Claims to recover salary for the work they had done after that date. The Court of Claims awarded them back salary on the purely technical ground that the rider did not end their employment with the government but merely stopped the payment of their salaries out of general appropriations. Accordingly, since their continued employment was lawful, they could be paid for it out of the funds earmarked for the satisfaction of judgments allowed by the Court of Claims.

Lovett, Watson, and Dodd attacked the legislative rider on several

grounds, but their major contention was that it amounted to a bill of attainder. This is also the position taken by Mr. Justice Black in his opinion for the Court condemning Congress' action as a violation of the constitutional prohibition on bills of attainder. In coming to this conclusion, Justice Black relied heavily on the two "test oath" cases decided in 1866, which he said "stand for the proposition that legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution." (*Cummings v. Missouri*, 4 Wall. 277 and *Ex Parte Garland*, 4 Wall. 333 set aside both state and federal legislation which sought to bar former Confederates from certain professions by requiring an oath that the person had not participated in the rebellion or aided those who had.)

This is the way Justice Black explained why the legislative rider must fall under the constitutional ban on bills of attainder: "Section 304, thus, clearly accomplishes the punishment of named individuals without a judicial trial. The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal. No one would think that Congress could have passed a valid law, stating that after investigation it had found Lovett, Dodd, and Watson 'guilty' of the crime of engaging in 'subversive activities' defined that term for the first time, and sentenced them to perpetual exclusion from any government employment. Section 304, while it does not use that language, accomplishes that result. The effect was to inflict punishment without the safeguards of a judicial trial and 'determined by no previous law or fixed rule.' The Constitution declares that that cannot be done either by a State or by the United States."

Mr. Justice Frankfurter joined his colleagues in affirming the judgment of the Court of Claims because he was of the opinion that Lovett, Watson, and Dodd were entitled to compensation for the work they did after November 15. His concurring opinion in the case undertakes to show, however, that the legislative rider is not a bill of attainder:

Nothing would be easier than personal condemnation of the provision of the Urgent Deficiency Appropriation Act of 1943 here challenged. . . . But the judicial function exacts considerations very different from those which may determine a vote in Congress for or against a measure. And what may be decisive for a Presidential disapproval may not at all satisfy the established criteria

which alone justify this Court's striking down an act of Congress.

It is not for us to find unconstitutionality in what Congress enacted although it may imply notions that are abhorrent to us as individuals or policies we deem harmful to the country's well-being. . . .

Not to exercise by indirection authority which the Constitution denied to this Court calls for the severest intellectual detachment and the most alert self-restraint. The scrupulous observance, with some deviations of the professed limits of this Court's power to strike down legislation has been, perhaps, the one quality the great judges of the Court have had in common. Particularly when Congressional legislation is under scrutiny, every rational trail must be pursued to prevent collision between Congress and Court. For Congress can readily mend its ways, or the people may express disapproval by choosing different representatives. But a decree of unconstitutionality by this Court is fraught with consequences so enduring and far-reaching as to be avoided unless no choice is left in reason.

The inclusion of §304 in the Appropriation Bill undoubtedly raises serious constitutional questions. But the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible. And so the "Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." Brandeis, J., concurring, in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341, at 346. That a piece of legislation under scrutiny may be widely unpopular is as irrelevant to the observance of these rules for abstention from avoidable adjudications as that it is widely popular. Some of these rules may well appear over-refined or evasive to the laity. But they have the support not only of the profoundest wisdom. They have been vindicated, in conspicuous instances of disregard, by the most painful lessons of our constitutional history.

. . . . .  
The Court reads §304 as though it expressly discharged respondents from office which they held and prohibited them from holding any office under the Government in the future. On the basis of this reading the Court holds that the provision is a bill of attainder in

that it "inflicts punishment without a judicial trial," *Cummings v. Missouri*, 4 Wall. 277, 323, and is therefore forbidden by Article I, §9 of the Constitution. Congress is said to have inflicted this punishment upon respondents because it disapproved the beliefs they were thought to hold. Such a colloquial treatment of the statute neglects the relevant canons of constitutional adjudication and disregards those features of the legislation which call its validity into question on grounds other than inconsistency with the prohibition against bills of attainder. To characterize an act of Congress as a bill of attainder readily enlists, however, the instincts of a free people who are committed to a fair judicial process for the determination of issues affecting life, liberty, or property and naturally abhor anything that resembles legislative determination of guilt and legislative punishment. As I see it, our duty precludes reading §304 as the Court reads it. But even if it were to be so read the provision is not within the constitutional conception of a bill of attainder.

Broadly speaking, two types of constitutional claims come before this Court. Most constitutional issues derive from the broad standards of fairness written into the Constitution (e.g. "due process," "equal protection of the laws," "just compensation"), and the division of power as between States and Nation. Such questions, by their very nature, allow a relatively wide play for individual legal judgment. The other class gives no such scope. For this second class of constitutional issues derives from very specific provisions of the Constitution. These had their source in definite grievances and led the Fathers to proscribe against recurrence of their experience. These specific grievances and the safeguards against their recurrence were not defined by the Constitution. They were defined by history. Their meaning was so settled by history that definition was superfluous. Judicial enforcement of the Constitution must respect these historic limits.

The prohibition of bills of attainder falls of course among these very specific constitutional provisions. The distinguishing characteristic of a bill of attainder is the substitution of legislative determination of guilt and legislative imposition of punishment for judicial finding and sentence. "A bill of attainder, by the common law, as our fathers imported it from England and practised it themselves, before the adoption of the Constitution, was an act of sovereign power, in the form of a special statute . . . by which a man was

pronounced guilty or attainted of some crime, and punished by deprivation of his vested rights, without trial or judgment *per legem terrae*." Farrar, *Manual of the Constitution* (1867) 419. . . . It was this very special, narrowly restricted, intervention by the legislature, in matters for which a decent regard for men's interests indicated a judicial trial, that the Constitution prohibited. It must be recalled that the Constitution was framed in an era when dispensing justice was a well-established function of the legislature. The prohibition against bills of attainder must be viewed in the background of the historic situation when moves in specific litigation that are now the conventional and, for the most part, the exclusive concern of courts were commonplace legislative practices. . . . Bills of attainder were part of what now are staple judicial functions which legislatures then exercised. It was this part of their recognized authority which the Constitution prohibited when it provided that "No Bill of Attainder . . . shall be passed." Section 304 lacks the characteristics of the enactments in the Statutes of the Realm and the Colonial Laws that bear the hallmarks of bills of attainder.

All bills of attainder specify the offense for which the attainted person was deemed guilty and for which the punishment was imposed. There was always a declaration of guilt either of the individual or the class to which he belonged. The offense might be a pre-existing crime or an act made punishable *ex post facto*. Frequently a bill of attainder was thus doubly objectionable because of its *ex post facto* features. This is the historic explanation for uniting the two mischiefs in one clause—"No Bill of Attainder or *ex post facto* Law shall be passed." No one claims that §304 is an *ex post facto* law. If it is in substance a punishment for acts deemed "subversive" (the statute, of course, makes no such charge) for which no punishment had previously been provided, it would clearly be *ex post facto*. Therefore, if §304 is a bill of attainder it is also an *ex post facto* law. But if it is not an *ex post facto* law, the reasons that establish that it is not are persuasive that it cannot be a bill of attainder. No offense is specified and no declaration of guilt is made. When the framers of the Constitution proscribed bills of attainder, they referred to a form of law which had been prevalent in monarchical England and was employed in the colonies. They were familiar with its nature; they had experienced its use; they knew what they wanted to prevent. It was not a law unfair in general,



even unfair because affecting merely particular individuals, that they outlawed by the explicitness of their prohibition of bills of attainder. "Upon this point a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349. Nor should resentment against an injustice displace controlling history in judicial construction of the Constitution.

Not only does §304 lack the essential declaration of guilt. It likewise lacks the imposition of punishment in the sense appropriate for bills of attainder. The punishment imposed by the most dreaded bill of attainder was of course death; lesser punishments were imposed by similar bills more technically called bills of pains and penalties. The Constitution outlaws this entire category of punitive measures. . . . The amount of punishment is immaterial to the classification of a challenged statute. But punishment is a prerequisite.

Punishment presupposes an offense, not necessarily an act previously declared criminal, but an act for which retribution is exacted. The fact that harm is inflicted by governmental authority does not make it punishment. Figuratively speaking all discomforting action may be deemed punishment because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation. A man may be forbidden to practice medicine because he has been convicted of a felony, . . . or because he is no longer qualified . . . "The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact." *Cummings v. Missouri*, 4 Wall. 277, 320.

Is it clear then that the respondents were removed from office, still accepting the Court's reading of the statute, as a punishment for past acts? Is it clear, that is, to that degree of certitude which is required before this Court declares legislation by Congress unconstitutional? The disputed section does not say so. So far as the House of Representatives is concerned, the Kerr Committee, which proposed the measure, and many of those who voted in favor of the Bill (assuming it is appropriate to go behind the terms of a statute to ascertain the unexpressed motive of its members), no doubt considered the respondents "subversive" and wished to exclude them from the Government because of their past associations and their present views. But the legislation upon which we now

pass judgment is the product of both Houses of Congress and the President. The Senate five times rejected the substance of §304. It finally prevailed, not because the Senate joined in an unexpressed declaration of guilt and retribution for it, but because the provision was included in an important appropriation bill. The stiffest interpretation that can be placed upon the Senate's action is that it agreed to remove the respondents from office (still assuming the Court's interpretation of §304) without passing any judgment on their past conduct or present views

Section 304 became law by the President's signature. His motive in allowing it to become law is free from doubt. He rejected the notion that the respondents were "subversive," and explicitly stated that he wished to retain them in the service of the Government. . . . Historically, Parliament passed bills of attainder at the behest of the monarch. . . . The Constitution, of course, provides for the enactment of legislation even against disapproval by the Executive. But to hold that a measure which did not express a judgment of condemnation by the Senate and carried an affirmative disavowal of such condemnation by the President constitutes a bill of attainder, disregards the historic tests for determining what is a bill of attainder. At the least, there are such serious objections to finding §304 a bill of attainder that it can be declared unconstitutional only by a failure to observe that this Court reaches constitutional invalidation only through inescapable necessity. "It must be evident to anyone that the power to declare a legislative enactment void is one which the judge, conscious of the fallibility of the human judgment, will shrink from exercising in any case where he can conscientiously and with due regard to duty and official oath decline the responsibility." 1 Cooley, *Constitutional Limitations* (8th ed., 1927) 332.

But even if it be agreed, for purposes of characterizing the deprivation of the statute as punishment, that the motive of Congress was past action of the respondents, presumed motive cannot supplant expressed legislative judgment. "The expectations of those who sought the enactment of legislation may not be used for the purpose of affixing to legislation when enacted a meaning which it does not express." *United States v. Goelet*, 232 U.S. 293, 298. Congress omitted from §304 any condemnation for which the presumed punishment was a sanction. Thereby it negated the essential no-

tion of a bill of attainder. It may be said that such a view of a bill of attainder offers Congress too easy a mode of evading the prohibition of the Constitution. Congress need merely omit its ground of condemnation and legislate the penalty! But the prohibition against a "Bill of Attainder" is only one of the safeguards of liberty in the arsenal of the Constitution. There are other provisions in the Constitution, specific and comprehensive, effectively designed to assure the liberties of our citizens. The restrictive function of this clause against bills of attainder was to take from the legislature a judicial function which the legislature once possessed. If Congress adopted, as it did, a form of statute so lacking in any pretension to the very quality which gave a bill of attainder its significance, that of a declaration of guilt under circumstances which made its determination grossly unfair, it simply passed an act which this Court ought not to denounce as a bill of attainder. And not the less so because Congress may have been conscious of the limitations which the Constitution has placed upon it against passing bills of attainder. If Congress chooses to say that men shall not be paid, or even that they shall be removed from their jobs, we cannot decide that Congress also said that they are guilty of an offense. And particularly we cannot so decide as a necessary assumption for declaring an act of Congress invalid. Congress has not legislated that which is attributed to it, for the simple fact is that Congress has said nothing. The words Congress used are not susceptible of being read as a legislative verdict of guilt against the respondents no matter what dictionary, or what form of argumentation, we use as aids.

This analysis accords with our prior course of decision. In *Cummings v. Missouri*, *supra*, and *Ex parte Garland*, 4 Wall. 333, the Court dealt with legislation of very different scope and significance from that now before us. While the provisions involved in those cases did not condemn or punish specific persons by name, they proscribed all guilty of designated offenses. Refusal to take a prescribed oath operated as an admission of guilt and automatically resulted in the disqualifying punishment. Avoidance of legislative proscription for guilt under the provisions in the *Cummings* and *Garland* cases required positive exculpation. That the persons legislatively punished were not named was a mere detail of identification. Congress and the Missouri legislature, respectively, had provided the most effective method for insuring identification. These enact-

ments followed the example of English bills of attainder which condemned a named person and "his adherents." Section 304 presents a situation wholly outside the ingredients of the enactments that furnished the basis for the Cummings and Garland decisions. (\*)

. . . . .

"THE PUBLIC SCHOOL MUST KEEP SCRUPULOUSLY FREE FROM  
ENTANGLEMENT IN THE STRIFE OF SECTS"

*McCullum v. Board of Education*

333 U.S. 203, 212 (1948)

Within the short span of thirteen months, the Supreme Court decided two cases concerned with the relation of government to organized religion, both of which were assailed as creating dangerous precedents, but for opposite reasons. The Court divided five to four in February, 1947, when it sustained the right of a local school board to reimburse Catholic parents for money spent in transporting their children to and from parochial schools. *Everson v. Board of Education*, 330 U.S. 1. These schools offer secular studies as well as regular religious instruction. Rejecting the taxpayer's complaint that the reimbursement of Catholic parents resulted in state support of schools maintained by the Catholic Church, Mr. Justice Black said for the majority: "We cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools." This policy is merely one for providing "a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." Justices Frankfurter, Jackson, Rutledge, and Burton dissented.

The second case was decided in March, 1948, and arose as an attack by a parent on the "released-time" program of Champaign, Illinois. *McCullum v. Board of Education*. The program had been in effect since 1940. In that year representatives of the Protestant, Roman Catholic, and Jewish faiths formed the Champaign Council on Religious Education and secured permission from the Board of Education to offer religious instruction to public school pupils. Only those pupils whose parents had signed printed cards requesting that their children be allowed to attend were to come to the religious classes. The classes were held once

a week, a half-hour for the younger children and forty-five minutes for the older ones. The religious teachers were employed by the Council, at no expense to the school authorities, but were subject to the approval and supervision of the superintendent of schools. The classes were taught in separate groups, by Protestant teachers, Catholic priests, and a rabbi. They were conducted in the regular classrooms of the school building. Pupils not taking religious instruction were required to leave their classrooms and go to some other part of the school building for their secular studies. However, the pupils who were released from secular study were required to attend the religious classes, and reports of their attendance were to be made to their secular teachers.

After summarizing these facts, Mr. Justice Black, who spoke for the Court in this case also, went on to say that they "show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education." He continued: "The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith." The Court seemed to be saying that the Champaign program was in conflict with the provision of the First Amendment forbidding the establishment of a religion, an interdict now applicable to the states under the Fourteenth Amendment.

Only Justice Reed dissented, reminding his brethren of the many religious influences, such as chapel service, which have always been a part of life at many public educational institutions. No one had really demonstrated that the Champaign program interfered with the free exercise of religion. To him it was obvious that allowing children of all faiths to receive religious instruction did not interfere with the free exercise of religion. Even if it were true that the children who were not attending religious classes were embarrassed by being set off from those who did, the "embarrassment" could hardly be regarded as a prohibition against the free exercise of religion. Nor could it be said that "recognition of the interest of our nation in religion, through the granting, to qualified representatives of the principal faiths, of opportunity to present religion as an optional, extracurricular subject during released school time in public school buildings, was equivalent to an establishment of religion."

In a long and learned concurring opinion, joined in by Justices Jack-

son, Rutledge, and Burton, Mr. Justice Frankfurter discussed the struggles to erect a "wall of separation between Church and State," as Jefferson phrased it, and the history of the "released-time" movement:

We dissented in *Everson v. Board of Education*, 330 U.S. 1, because in our view the Constitutional principle requiring separation of Church and State compelled invalidation of the ordinance sustained by the majority. Illinois has here authorized the commingling of religious with secular instruction in the public schools. The Constitution of the United States forbids this.

This case, in the light of the *Everson* decision, demonstrates anew that the mere formulation of a relevant Constitutional principle is the beginning of the solution of a problem, not its answer. This is so because the meaning of a spacious conception like that of the separation of Church from State is unfolded as appeal is made to the principle from case to case. We are all agreed that the First and the Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an "established church." But agreement, in the abstract, that the First Amendment was designed to erect a "wall of separation between Church and State," does not preclude a clash of views as to what the wall separates. Involved is not only the Constitutional principle but the implications of judicial review in its enforcement. Accommodation of legislative freedom and Constitutional limitations upon that freedom cannot be achieved by a mere phrase. We cannot illuminatingly apply the "wall-of-separation" metaphor until we have considered the relevant history of religious education in America, the place of the "released-time" movement in that history, and its precise manifestation in the case before us.

To understand the particular program now before us as a conscientious attempt to accommodate the allowable functions of Government and the special concerns of the Church within the framework of our Constitution and with due regard to the kind of society for which it was designed, we must put this Champaign program of 1940 in its historic setting. Traditionally, organized education in the Western world was Church education. It could hardly be otherwise when the education of children was primarily study of the Word and the ways of God. Even in the Protestant countries, where there was a less close identification of Church and State, the basis

of education was largely the Bible, and its chief purpose inculcation of piety. To the extent that the State intervened, it used its authority to further aims of the Church.

The emigrants who came to these shores brought this view of education with them. Colonial schools certainly started with a religious orientation. When the common problems of the early settlers of the Massachusetts Bay Colony revealed the need for common schools, the object was the defeat of "one chief project of that old deluder, Satan, to keep men from the knowledge of the Scriptures." . . .

The evolution of colonial education, largely in the service of religion, into the public school system of today is the story of changing conceptions regarding the American democratic society, of the functions of State-maintained education in such a society, and of the role therein of the free exercise of religion by the people. The modern public school derived from a philosophy of freedom reflected in the First Amendment. It is appropriate to recall that the Remonstrance of James Madison, an event basic in the history of religious liberty, was called forth by a proposal which involved support to religious education. See MR. JUSTICE RUTLEDGE's opinion in the *Everson* case, *supra*, 330 U.S. at 36-37. As the momentum for popular education increased and in turn evoked strong claims for State support of religious education, contests not unlike that which in Virginia had produced Madison's Remonstrance appeared in various form in other States. New York and Massachusetts provide famous chapters in the history that established dissociation of religious teaching from State-maintained schools. In New York, the rise of the common schools led, despite fierce sectarian opposition, to the barring of tax funds to church schools, and later to any school in which sectarian doctrine was taught. (\*) In Massachusetts, largely through the efforts of Horace Mann, all sectarian teachings were barred from the common school to save it from being rent by denominational conflict. (\*) The upshot of these controversies, often long and fierce, is fairly summarized by saying that long before the Fourteenth Amendment subjected the States to new limitations, the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people. . . .

Separation in the field of education, then, was not imposed upon

unwilling States by force of superior law. In this respect the Fourteenth Amendment merely reflected a principle then dominant in our national life. To the extent that the Constitution thus made it binding upon the States, the basis of the restriction is the whole experience of our people. Zealous watchfulness against fusion of secular and religious activities by Government itself, through any of its instruments but especially through its educational agencies, was the democratic response of the American community to the particular needs of a young and growing nation, unique in the composition of its people. (\*) A totally different situation elsewhere, as illustrated for instance by the English provisions for religious education in State-maintained schools, only serves to illustrate that free societies are not cast in one mould. . . . Different institutions evolve from different historic circumstances.

It is pertinent to remind that the establishment of this principle of Separation in the field of education was not due to any decline in the religious beliefs of the people. Horace Mann was a devout Christian, and the deep religious feeling of James Madison is stamped upon the Remonstrance. The secular public school did not imply indifference to the basic role of religion in the life of the people, nor rejection of religious education as a means of fostering it. The claims of religion were not minimized by refusing to make the public schools agencies for their assertion. The non-sectarian or secular public school was the means of reconciling freedom in general with religious freedom. The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered. Designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogeneous democratic people, the public school must keep scrupulously free from entanglement in the strife of sects. The preservation of the community from divisive conflicts, of Government from irreconcilable pressures by religious groups, of religion from censorship and coercion however subtly exercised, requires strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice.



This development of the public school as a symbol of our secular unity was not a sudden achievement nor attained without violent conflict. (\*) While in small communities of comparatively homogeneous religious beliefs, the need for absolute separation presented no urgencies, elsewhere the growth of the secular school encountered the resistance of feeling strongly engaged against it. But the inevitability of such attempts is the very reason for Constitutional provisions primarily concerned with the protection of minority groups. And such sects are shifting groups, varying from time to time, and place to place, thus representing in their totality the common interest of the nation.

Enough has been said to indicate that we are dealing not with a full-blown principle, nor one having the definiteness of a surveyor's metes and bounds. But by 1875 the separation of public education from Church entanglements, of the State from the teaching of religion, was firmly established in the consciousness of the nation. In that year President Grant made his famous remarks to the Convention of the Army of the Tennessee:

"Encourage free schools and resolve that not one dollar appropriated for their support shall be appropriated for the support of any sectarian schools. Resolve that neither the State nor the nation, nor both combined, shall support institutions of learning other than those sufficient to afford every child growing up in the land the opportunity of a good common school education, unmixed with sectarian, pagan, or atheistical dogmas. Leave the matter of religion to the family altar, the church, and the private school, supported entirely by private contributions. Keep the church and state forever separate." . . .

So strong was this conviction, that rather than rest on the comprehensive prohibitions of the First and Fourteenth Amendments, President Grant urged that there be written into the United States Constitution particular elaborations, including a specific prohibition against the use of public funds for sectarian education, (\*) such as had been written into many State constitutions. (\*) By 1894, in urging the adoption of such a provision in the New York Constitution, Elihu Root was able to summarize a century of the nation's history: "It is not a question of religion, or of creed, or of party; it

is a question of declaring and maintaining the great American principle of eternal separation between Church and State." . . . The extent to which this principle was deemed a presupposition of our Constitutional system is strikingly illustrated by the fact that every State admitted into the Union since 1876 was compelled by Congress to write into its constitution a requirement that it maintain a school system "free from sectarian control." (\*)

Prohibition of the commingling of sectarian and secular instruction in the public school is of course only half the story. A religious people was naturally concerned about the part of the child's education entrusted "to the family altar, the church, and the private school." The promotion of religious education took many forms. Laboring under financial difficulties and exercising only persuasive authority, various denominations felt handicapped in their task of religious education. Abortive attempts were therefore frequently made to obtain public funds for religious schools. (\*) But the major efforts of religious inculcation were a recognition of the principle of Separation by the establishment of church schools privately supported. Parochial schools were maintained by various denominations. These, however, were often beset by serious handicaps, financial and otherwise, so that the religious aims which they represented found other directions. There were experiments with vacation schools, with Saturday as well as Sunday schools. (\*) They all fell short of their purpose. It was urged that by appearing to make religion a one-day-a-week matter, the Sunday school, which acquired national acceptance, tended to relegate the child's religious education, and thereby his religion, to a minor role not unlike the enforced piano lesson.

Out of these inadequate efforts evolved the week-day church school, held on one or more afternoons a week after the close of the public school. But children continued to be children; they wanted to play when school was out, particularly when other children were free to do so. Church leaders decided that if the week-day church school was to succeed, a way had to be found to give the child his religious education during what the child conceived to be his "business hours."

The initiation of the movement (\*) may fairly be attributed to Dr. George U. Wenner. The underlying assumption of his proposal, made at the Interfaith Conference on Federation held in New York

City in 1905, was that the public school unduly monopolized the child's time and that the churches were entitled to their share of it. (\*) This, the schools should "release." Accordingly, the Federation, citing the example of the Third Republic of France, (\*) urged that upon the request of their parents children be excused from public school on Wednesday afternoon, so that the churches could provide "Sunday school on Wednesday." This was to be carried out on church premises under church authority. Those not desiring to attend church schools would continue their normal classes. Lest these public school classes unfairly compete with the church education, it was requested that the school authorities refrain from scheduling courses or activities of compelling interest or importance.

The proposal aroused considerable opposition and it took another decade for a "released time" scheme to become part of a public school system. Gary, Indiana, inaugurated the movement. At a time when industrial expansion strained the communal facilities of the city, Superintendent of Schools Wirt suggested a fuller use of the school buildings. Building on theories which had become more or less current, he also urged that education was more than instruction in a classroom. The school was only one of several educational agencies. The library, the playground, the home, the church, all have their function in the child's proper unfolding. Accordingly, Wirt's plan sought to rotate the schedules of the children during the school-day so that some were in class, others were in the library, still others in the playground. And some, he suggested to the leading ministers of the City, might be released to attend religious classes if the churches of the City cooperated and provided them. They did, in 1914, and thus was "released time" begun. The religious teaching was held on church premises and the public schools had no hand in the conduct of these church schools. They did not supervise the choice of instructors or the subject matter taught. Nor did they assume responsibility for the attendance, conduct or achievement of the child in a church school; and he received no credit for it. The period of attendance in the religious schools would otherwise have been a play period for the child, with the result that the arrangement did not cut into public school instruction or truly affect the activities or feelings of the children who did not attend the church schools. (\*)

From such a beginning "released time" has attained substantial

proportions. In 1914-15, under the Gary program, 619 pupils left the public schools for the church schools during one period a week. According to responsible figures almost 2,000,000 in some 2,200 communities participated in "released time" programs during 1947. (\*) A movement of such scope indicates the importance of the problem to which the "released time" programs are directed. But to the extent that aspects of these programs are open to Constitutional objection, the more extensively the movement operates, the more ominous the breaches in the wall of separation.

Of course, "released time" as a generalized conception, undefined by differentiating particularities, is not an issue for Constitutional adjudication. Local programs differ from each other in many and crucial respects. Some "released time" classes are under separate denominational auspices, others are conducted jointly by several denominations, often embracing all the religious affiliations of a community. Some classes in religion teach a limited sectarianism; others emphasize democracy, unity and spiritual values not anchored in a particular creed. Insofar as these are manifestations merely of the free exercise of religion, they are quite outside the scope of judicial concern, except insofar as the Court may be called upon to protect the right of religious freedom. It is only when challenge is made to the share that the public schools have in the execution of a particular "released time" program that close judicial scrutiny is demanded of the exact relation between the religious instruction and the public educational system in the specific situation before the Court. (\*)

The substantial differences among arrangements lumped together as "released time" emphasize the importance of detailed analysis of the facts to which the Constitutional test of Separation is to be applied. How does "released time" operate in Champaign? Public school teachers distribute to their pupils cards supplied by church groups, so that the parents may indicate whether they desire religious instruction for their children. For those desiring it, religious classes are conducted in the regular classrooms of the public schools by teachers of religion paid by the churches and appointed by them, but, as the State court found, "subject to the approval and supervision of the Superintendent." The courses do not profess to give secular instruction in subjects concerning religion. Their candid purpose is sectarian teaching. While a child can go to any of the religious classes offered, a particular sect wishing a teacher for its

devotees requires the permission of the school superintendent "who in turn will determine whether or not it is practical for said group to teach in said school system." If no provision is made for religious instruction in the particular faith of a child, or if for other reasons the child is not enrolled in any of the offered classes, he is required to attend a regular school class, or a study period during which he is often left to his own devices. Reports of attendance in the religious classes are submitted by the religious instructor to the school authorities, and the child who fails to attend is presumably deemed a truant.

Religious education so conducted on school time and property is patently woven into the working scheme of the school. The Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects. The fact that this power has not been used to discriminate is beside the point. Separation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally. That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend. (\*) Again, while the Champaign school population represents only a fraction of the more than two hundred and fifty sects of the nation, not even all the practicing sects in Champaign are willing or able to provide religious instruction. The children belonging to these non-participating sects will thus have inculcated in them a feeling of separatism when the school should be the training ground for habits of community, or they will have religious instruction in a faith which is not that of their parents. As a result, the public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care. These are consequences not amenable to statistics. But they are precisely the consequences against which the Constitution was directed when it prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages. (\*)

Mention should not be omitted that the integration of religious

instruction within the school system as practiced in Champaign is supported by arguments drawn from educational theories as diverse as those derived from Catholic conceptions and from the writings of John Dewey. (\*) Movements like "released time" are seldom single in origin or aim. Nor can the intrusion of religious instruction into the public school system of Champaign be minimized by saying that it absorbs less than an hour a week; in fact, that affords evidence of a design constitutionally objectionable. If it were merely a question of enabling a child to obtain religious instruction with a receptive mind, the thirty or forty-five minutes could readily be found on Saturday or Sunday. If that were all, Champaign might have drawn upon the French system, known in its American manifestation as "dismissed time," whereby one school day is shortened to allow all children to go where they please, leaving those who so desire to go to a religious school. (\*) The momentum of the whole school atmosphere and school planning is presumably put behind religious instruction, as given in Champaign, precisely in order to secure for the religious instruction such momentum and planning. To speak of "released time" as being only half or three quarters of an hour is to draw a thread from a fabric.

We do not consider, as indeed we could not, school programs not before us which, though colloquially characterized as "released time," present situations differing in aspects that may well be constitutionally crucial. Different forms which "released time" has taken during more than thirty years of growth include programs which, like that before us, could not withstand the test of the Constitution; others may be found unexceptionable. We do not now attempt to weigh in the Constitutional scale every separate detail or various combination of factors which may establish a valid "released time" program. We find that the basic Constitutional principle of absolute Separation was violated when the State of Illinois, speaking through its Supreme Court, sustained the school authorities of Champaign in sponsoring and effectively furthering religious beliefs by its educational arrangement.

Separation means separation, not something less. Jefferson's metaphor in describing the relation between Church and State speaks of a "wall of separation," not of a fine line easily overstepped. The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity

of the State is it more vital to keep out divisive forces than in its schools, to avoid confusing, not to say fusing, what the Constitution sought to keep strictly apart. "The great American principle of eternal separation"—Elihu Root's phrase bears repetition—is one of the vital reliances of our Constitutional system for assuring unities among our people stronger than our diversities. It is the Court's duty to enforce this principle in its full integrity.

We renew our conviction that "we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion." *Everson v. Board of Education*, 330 U.S. at 59. If nowhere else, in the relation between Church and State, "good fences make good neighbors."

PUBLICATIONS INCITING TO CRIME AND THE "PSYCHOLOGICAL  
DOGMAS OF THE SPENCERIAN ERA"

*Winters v. New York*

333 U.S. 507, 520 (1948)

Winters, a New York City book dealer, was convicted for violating Subsection 2 of Section 1141 of the New York Penal Law. The subsection reads:

"Section 1141. Obscene prints and articles. 1. A person . . . who, 2. Prints, utters, publishes, sells, lends, gives away, distributes or shows, or has in his possession with intent to sell, lend, give away, distribute or show, or otherwise offers for sale, loan, gift or distribution, any book, pamphlet, magazine, newspaper or other printed paper devoted to the publication, and principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime; . . . Is guilty of a misdemeanor . . ."

One of the counts of the information against Winters charged him with possessing, with intent to sell, "a certain obscene, lewd, lascivious, filthy, indecent and disgusting magazine entitled *Headquarters Detective, True Cases from the Police Blotter, June 1940*, the same being devoted to the publication and principally made up of criminal news, police reports, and accounts of criminal deeds, and pictures and stories of deeds of bloodshed, lust and crime."

In sustaining the conviction, the New York Court of Appeals construed Subsection 2 of Section 1141 as applying to publications which

present their collections of pictures and stories of bloodshed and lust in such a fashion "as to become vehicles for inciting violent and depraved crimes against the person." When the appeal was carried to the Supreme Court of the United States, the case was argued three different times before being decided. A majority of six finally reversed Winters' conviction and held that the provision in question was so vague as to leave persons uncertain as to the conduct it prohibited and abridged freedom of speech and press safeguarded by the Fourteenth Amendment against invasion by the states. While recognizing the right of a state in the exercise of its police power to protect young people against salacious publications which incite to crime, the Court found the New York law to be in conflict with the rule that "a statute so vague and indefinite, in form and as interpreted, as to permit within the scope of its language the punishment of incidents fairly within the protection of the guarantee of free speech is void, on its face, as contrary to the Fourteenth Amendment."

Referring to the magazines Winters was selling, Mr. Justice Reed observed in his opinion for the Court: "Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature." Later he supplied another justification for the Court's decision: "The present case as to a vague statute abridging free speech involves the circulation of only vulgar magazines. The next may call for decision as to free expression of political views in the light of a statute intended to punish subversive activities."

Joined by Justices Jackson and Burton, Mr. Justice Frankfurter dissented, vigorously challenging both the logic and the wisdom of the majority's disposition of the case:

By today's decision the Court strikes down an enactment that has been part of the laws of New York for more than sixty years, (\*) and New York is but one of twenty States having such legislation. Four more States have statutes of like tenor which are brought into question by this decision, but variations of nicety preclude one from saying that these four enactments necessarily fall within the condemnation of this decision. Most of this legislation is also more than sixty years old. The latest of the statutes which cannot be differentiated from New York's law, that of the State of Washington, dates from 1909. . . . Nor is this an instance where the pressure of proximity or propaganda led to the enactment of the same measure in a concentrated region of States. The impressiveness of the number of



States which have this law on their statute books is reinforced by their distribution throughout the country and the time range of the adoption of the measure. (\*) . . .

. . . . .

This body of laws represents but one of the many attempts by legislatures to solve what is perhaps the most persistent, intractable, elusive, and demanding of all problems of society—the problem of crime, and, more particularly, of its prevention. By this decision the Court invalidates such legislation of almost half the States of the Union. The destructiveness of the decision is even more far-reaching. This is not one of those situations where power is denied to the States because it belongs to the Nation. These enactments are invalidated on the ground that they fall within the prohibitions of the “vague contours” of the Due Process Clause. The decision thus operates equally as a limitation upon Congressional authority to deal with crime, and, more especially, with juvenile delinquency. These far-reaching consequences result from the Court’s belief that what New York, among a score of States, has prohibited, is so empty of meaning that no one desirous of obeying the law could fairly be aware that he was doing that which was prohibited.

Fundamental fairness of course requires that people be given notice of what to avoid. If the purpose of a statute is undisclosed, if the legislature’s will has not been revealed, it offends reason that punishment should be meted out for conduct which at the time of its commission was not forbidden to the understanding of those who wished to observe the law. This requirement of fair notice that there is a boundary of prohibited conduct not to be overstepped is included in the conception of “due process of law.” The legal jargon for such failure to give forewarning is to say that the statute is void for “indefiniteness.”

But “indefiniteness” is not a quantitative concept. It is not even a technical concept of definite components. It is itself an indefinite concept. There is no such thing as “indefiniteness” in the abstract, by which the sufficiency of the requirement expressed by the term may be ascertained. The requirement is fair notice that conduct may entail punishment. But whether notice is or is not “fair” depends upon the subject matter to which it relates. Unlike the abstract stuff of mathematics, or the quantitatively ascertainable ele-

ments of much of natural science, legislation is greatly concerned with the multiform psychological complexities of individual and social conduct. Accordingly, the demands upon legislation, and its responses, are variable and multiform. That which may appear to be too vague and even meaningless as to one subject matter may be as definite as another subject-matter of legislation permits, if the legislative power to deal with such a subject is not to be altogether denied. The statute books of every State are full of instances of what may look like unspecific definitions of crime, of the drawing of wide circles of prohibited conduct.

In these matters legislatures are confronted with a dilemma. If a law is framed with narrow particularity, too easy opportunities are afforded to nullify the purposes of the legislation. If the legislation is drafted in terms so vague that no ascertainable line is drawn in advance between innocent and condemned conduct, the purpose of the legislation cannot be enforced because no purpose is defined. It is not merely in the enactment of tax measures that the task of reconciling these extremes—of avoiding throttling particularity or unfair generality—is one of the most delicate and difficult confronting legislators. The reconciliation of these two contradictories is necessarily an empiric enterprise largely depending on the nature of the particular legislative problem.

What risks do the innocent run of being caught in a net not designed for them? How important is the policy of the legislation, so that those who really like to pursue innocent conduct are not likely to be caught unaware? How easy is it to be explicitly particular? How necessary is it to leave a somewhat penumbral margin but sufficiently revealed by what is condemned to those who do not want to sail close to the shore of questionable conduct? These and like questions confront legislative draftsmen. Answers to these questions are not to be found in any legislative manual nor in the work of great legislative draftsmen. They are not to be found in the opinions of this Court. These are questions of judgment, peculiarly within the responsibility and the competence of legislatures. The discharge of that responsibility should not be set at naught by abstract notions about "indefiniteness."

The action of this Court today in invalidating legislation having the support of almost half the States of the Union rests essentially on abstract notions about "indefiniteness." The Court's opinion could

have been written by one who had never read the issues of "Head-quarters Detective" which are the basis of the prosecution before us, who had never deemed their contents as relevant to the form in which the New York legislation was cast, had never considered the bearing of such "literature" on juvenile delinquency, in the allowable judgment of the legislature. Such abstractions disregard the considerations that may well have moved and justified the State in not being more explicit than these State enactments are. Only such abstract notions would reject the judgment of the States that they have outlawed what they have a right to outlaw, in the effort to curb crimes of lust and violence, and that they have not done it so recklessly as to occasion real hazard that other publications will thereby be inhibited, or also be subjected to prosecution.

This brings our immediate problem into focus. No one would deny, I assume, that New York may punish crimes of lust and violence. Presumably also, it may take appropriate measures to lower the crime rate. But he must be a bold man indeed who is confident that he knows what causes crimes. Those whose lives are devoted to an understanding of the problem are certain only that they are uncertain regarding the role of the various alleged "causes" of crime. Bibliographies of criminology reveal a depressing volume of writings on theories of causation. . . . Is it to be seriously questioned, however, that the State of New York, or the Congress of the United States, may make incitement to crime itself an offense? He too would indeed be a bold man who denied that incitement may be caused by the written word no less than by the spoken. If "the Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics" (Holmes, J., dissenting in *Lochner v. New York*, 198 U.S. 45, 75), neither does it enact the psychological dogmas of the Spencerian era. The painful experience which resulted from confusing economic dogmas with constitutional edicts ought not to be repeated by finding constitutional barriers to a State's policy regarding crime, because it may run counter to our inexperienced psychological assumptions or offend our presuppositions regarding incitements to crime in relation to the curtailment of utterance. This Court is not ready, I assume, to pronounce on causative factors of mental disturbance and their relation to crime. Without formally professing to do so, it may actually do so by invalidating legislation dealing with these problems as too "indefinite."

Not to make the magazines with which this case is concerned part of the Court's opinion is to play "Hamlet" without Hamlet. But the Court sufficiently summarizes one aspect of what the State of New York here condemned when it says "we can see nothing of any possible value to society in these magazines." From which it jumps to the conclusion that, nevertheless, "they are as much entitled to the protection of free speech as the best of literature." Wholly neutral futilities, of course, come under the protection of free speech as fully as do Keats' poems or Donne's sermons. But to say that these magazines have "nothing of any possible value to society" is only half the truth. This merely denies them goodness. It disregards their mischief. As a result of appropriate judicial determination, these magazines were found to come within the prohibition of the law against inciting "violent and depraved crimes against the person," and the defendant was convicted because he exposed for sale such materials. The essence of the Court's decision is that it gives publications which have "nothing of any possible value to society" constitutional protection but denies to the States the power to prevent the grave evils to which, in their rational judgment, such publications give rise. The legislatures of New York and the other States were concerned with these evils and not with neutral abstractions of harmlessness. Nor was the New York Court of Appeals merely resting, as it might have done, on a deep-seated conviction as to the existence of an evil and as to the appropriate means for checking it. That court drew on its experience, as revealed by "many recent records" of criminal convictions before it, for its understanding of the practical concrete reasons that led the legislatures of a score of States to pass the enactments now here struck down.

The New York Court of Appeals thus spoke out of extensive knowledge regarding incitements to crimes of violence. In such matters, local experience, as this Court has said again and again, should carry the greatest weight against our denying a State authority to adjust its legislation to local needs. But New York is not peculiar in concluding that "collections of pictures or stories of criminal deeds of bloodshed or lust unquestionably can be so massed as to become vehicles for inciting violent and depraved crimes against the person." . . .

Surely this Court is not prepared to say that New York cannot prohibit traffic in publications exploiting "criminal deeds of bloodshed or lust" so "as to become vehicles for inciting violent and depraved crimes against the person." Laws have here been sustained outlawing utterance far less confined. . . .

. . . . .

Since Congress and the States may take measures against "violent and depraved crimes," can it be claimed that "due process of law" bars measures against incitement to such crimes? But if they have power to deal with incitement, Congress and the States must be allowed the effective means for translating their policy into law. No doubt such a law presents difficulties in draftsmanship where publications are the instruments of incitement. The problem is to avoid condemnation so unbounded that neither the text of the statute nor its subject matter affords "a standard of some sort" (*United States v. Cohen Grocery Co.*, 255 U.S. 81, 92). Legislation must put people on notice as to the kind of conduct from which to refrain. Legislation must also avoid so tight a phrasing as to leave the area for evasion ampler than that which is condemned. How to escape, on the one hand, having a law rendered futile because no standard is afforded by which conduct is to be judged, and, on the other, a law so particularized as to defeat itself through the opportunities it affords for evasion, involves an exercise of judgment which is at the heart of the legislative process. It calls for the accommodation of delicate factors. But this accommodation is for the legislature to make and for us to respect, when it concerns a subject so clearly within the scope of the police power as the control of crime. Here we are asked to declare void the law which expresses the balance so struck by the legislature, on the ground that the legislature has not expressed its policy clearly enough. That is what it gets down to.

What were the alternatives open to the New York legislature? It could of course conclude that publications such as those before us could not "become vehicles for inciting violent and depraved crimes." But surely New York was entitled to believe otherwise. It is not for this Court to impose its belief, even if entertained, that no "massing of print and pictures" could be found to be effective means for inciting crime in minds open to such stimulation. What

gives judges competence to say that while print and pictures may be constitutionally outlawed because judges deem them "obscene," print and pictures which in the judgment of half the States of the Union operate as incitements to crime, enjoy a constitutional prerogative? When on occasion this Court has presumed to act as an authoritative faculty of chemistry, the result has not been fortunate. See *Burns Baking Co. v. Bryan*, 264 U.S. 504, where this Court ventured a view of its own as to what is reasonable "tolerance" in breadmaking. Considering the extent to which the whole domain of psychological inquiry has only recently been transformed and how largely the transformation is still in a pioneer stage, I should suppose that the Court would feel even less confidence in its views on psychological issues. At all events, it ought not to prefer its psychological views—for, at bottom, judgment on psychological matters underlies the legal issue in this case—to those implicit in an impressive body of enactments and explicitly given by the New York Court of Appeals, out of the abundance of its experience, as the reason for sustaining the legislation which the Court is nullifying.

But we are told that New York has not expressed a policy, that what looks like a law is not a law because it is so vague as to be meaningless. Suppose then that the New York legislature now wishes to meet the objection of the Court. What standard of definiteness does the Court furnish the New York legislature in finding indefiniteness in the present law? Should the New York legislature enumerate by name the publications which in its judgment are "inciting violent and depraved crimes"? Should the New York legislature spell out in detail the ingredients of stories or pictures which accomplish such "inciting"? What is there in the condemned law that leaves men in the dark as to what is meant by publications that exploit "criminal deeds of bloodshed or lust" thereby "inciting violent and depraved crimes"? What real risk do the Conan Doyles, the Edgar Allen Poes, the William Rougheads, the ordinary tribe of detective story writers, their publishers, or their booksellers run?

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The Court has been led into error, if I may respectfully suggest, by confusing want of certainty as to the outcome of different prosecutions for similar conduct, with want of definiteness in what the law prohibits. But diversity in result for similar conduct in different

trials under the same statute is an unavoidable feature of criminal justice. So long as these diversities are not designed consequences but due merely to human fallibility, they do not deprive persons of due process of law.

In considering whether New York has struck an allowable balance between its right to legislate in a field that is so closely related to the basic function of government, and the duty to protect the innocent from being punished for crossing the line of wrongdoing without awareness, it is relevant to note that this legislation has been upheld as putting law-abiding people on sufficient notice, by a court that has been astutely alert to the hazards of vaguely phrased penal laws and zealously protective of individual rights against "indefiniteness." . . . The circumstances of this case make it particularly relevant to remind, even against a confident judgment of the invalidity of legislation on the vague ground of "indefiniteness," that certitude is not the test of certainty. If men may reasonably differ whether the State has given sufficient notice that it is outlawing the exploitation of criminal potentialities, that in itself ought to be sufficient, according to the repeated pronouncements of this Court, to lead us to abstain from denying power to the States. And it deserves to be repeated that the Court is not denying power to the States in order to leave it to the Nation. It is denying power to both. By this decision Congress is denied power, as part of its efforts to grapple with the problems of juvenile delinquency in Washington, to prohibit what twenty States have seen fit to outlaw. Moreover, a decision like this has a destructive momentum much beyond the statutes of New York and of the other States immediately involved. Such judicial nullification checks related legislation which the States might deem highly desirable as a matter of policy, and this Court might not find unconstitutional.

Almost by his very last word on this Court, as by his first, Mr. Justice Holmes admonished against employing "due process of law" to strike down enactments, which, though supported on grounds that may not commend themselves to judges, can hardly be deemed offensive to reason itself. It is not merely in the domain of economics that the legislative judgment should not be subtly supplanted by the judicial judgment. "I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions." So wrote Mr. Justice Holmes in summing

up his protest for nearly thirty years against using the Fourteenth Amendment to cut down the constitutional rights of the States. Baldwin v. Missouri, 281 U.S. 586, 595 (dissenting).

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## CRIMINAL JUSTICE IN AMERICA

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### "CERTAIN SAFEGUARDS ARE ESSENTIAL TO CRIMINAL JUSTICE"

*Adams v. United States ex rel. McCann*

317 U.S. 269 (1942)

Among the safeguards which the United States Constitution extends to persons accused of federal crimes are trial by jury and the right to counsel. Justice Frankfurter's opinion for the Court in the McCann case shows that there are circumstances in which both of these constitutional rights can be waived by a defendant. Indicted for using the mails to defraud, McCann insisted on representing himself and when his case came to trial rejected trial by jury, requesting to be tried by the judge alone.

Joined by Justices Black and Murphy, Justice Douglas argued that even if trial by jury could be waived in a federal criminal prosecution, a defendant should not be permitted to make the decision without the benefit of counsel, especially when the prosecution is under an extremely complicated statute. Justice Murphy filed a separate dissent, saying that in view of the "fundamental nature of jury trial, and its beneficial effects as a means of leavening justice with the spirit of the times, I do not concede that the right to a jury trial can be waived in criminal proceedings in the federal courts."

Mr. Justice Frankfurter's opinion for the Court read in part:

. . . . .  
McCann was indicted on six counts for using the mails to defraud, in violation of §215 of the Criminal Code . . . From the time of his arraignment on February 18, 1941, to the prosecution of his appeal in the court below, McCann insisted on conducting his case

without the assistance of a lawyer. When called upon to plead to the indictment, he refused to do so; a plea of not guilty was entered on his behalf. The District Court at that time advised McCann to retain counsel. He refused, however, "stating in substance that he desired to represent himself, that the case was very complicated, and that he was so familiar with its details that no attorney would be able to give him as competent representation as he would be able to give himself."

When the case came on for trial on July 7, 1941, McCann repeated, in reply to the judge's inquiry whether he had counsel, that he wished to represent himself. In response to the court's further inquiry whether he was admitted to the bar, McCann "replied that he was not, but that he had studied law, and was sufficiently familiar therewith adequately to defend himself, and was more familiar with the complicated facts of his case than any attorney could ever be."(\*) McCann "then moved to have the case tried without a jury by the judge alone. There was a brief discussion between the Court, the petitioner, and the Assistant United States Attorney," after which McCann submitted the following over his signature: "I, Gene McCann, the defendant herein, appearing personally, do hereby waive a trial by jury in the above entitled case, having been advised by the Court of my constitutional right." The Assistant United States Attorney consented, and the judge (one of long trial experience and tested solicitude for the civilized administration of criminal justice) entered an order approving this "waiver."

The trial then got under way. It lasted for two weeks and a half, and throughout the entire proceedings McCann represented himself. He was convicted on July 22, 1941, and was sentenced to imprisonment for six years and to pay a fine of \$600. He took an appeal, and the trial judge fixed bail at \$10,000. Being unable to procure this sum, he remained in custody. Then followed applications to the Circuit Court of Appeals, likewise pressed by McCann himself, for extending the time for filing a bill of exceptions. In these proceedings both the trial and appellate courts again suggested to McCann the advisability of being represented by counsel. After having personally made these numerous applications, McCann finally secured the assistance of an attorney. . . .

As is pointed out in the opinion of the Circuit Court of Appeals, "At no time did he [McCann] indicate that he wished a jury or that

he repented of his consent—either while the cause was in the District Court or in this court—until the attorney, who now represents him, in March, 1942, raised the point” at the court’s invitation. The “point” thus projected into the case by the Circuit Court of Appeals was presented, in its own words, “in the barest possible form: Has an accused, who is without counsel, the power at his own instance to surrender his right of trial by jury when indicted for felony?” (\*) The Circuit Court of Appeals, with one judge dissenting, answered this question in the negative. It held that no person accused of a felony—who is himself not a lawyer—can waive trial by a jury, no matter how capable he is of making an intelligent, informed choice and how strenuously he insists upon such a choice, unless he does so upon the advice of an attorney. . . .

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This brings us to the merits. They are controlled in principle by *Patton v. United States*, 281 U.S. 276, and *Johnson v. Zerbst*, 304 U.S. 458. The short of the matter is that an accused, in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury, and so likewise may he competently and intelligently waive his Constitutional right to assistance of counsel. There is nothing in the Constitution to prevent an accused from choosing to have his fate tried before a judge without a jury even though, in deciding what is best for himself, he follows the guidance of his own wisdom and not that of a lawyer. . . .

Certain safeguards are essential to criminal justice. The court must be uncoerced, . . . and it must have no interest other than the pursuit of justice . . . The accused must have ample opportunity to meet the case of the prosecution. To that end, the Sixth Amendment of the Constitution abolished the rigors of the common law by affording one charged with crime the assistance of counsel for his defense . . . Such assistance “in the particular situation” of “ignorant defendants in a capital case” led to recognition that “the benefit of counsel was essential to the substance of a hearing,” as guaranteed by the Due Process Clause of the Fourteenth Amendment, in criminal prosecutions in the state courts. . . . The relation of trial by jury to civil rights—especially in criminal cases—is fully revealed by the history which gave rise to the provisions of the Constitution which guarantee that right. Article III, §2, paragraph

3; Sixth Amendment; Seventh Amendment. That history is succinctly summarized in the Declaration of Independence, in which complaint was made that the Colonies were deprived, "in many cases, of the benefits of Trial by Jury." But procedural devices rooted in experience were written into the Bill of Rights not as abstract rubrics in an elegant code but in order to assure fairness and justice before any person could be deprived of "life, liberty or property."

It hardly occurred to the framers of the original Constitution and of the Bill of Rights that an accused, acting in obedience to the dictates of self-interest or the promptings of conscience, should be prevented from surrendering his liberty by admitting his guilt. The Constitution does not compel an accused who admits his guilt to stand trial against his own wishes. Legislation apart, no social policy calls for the adoption by the courts of an inexorable rule that guilt must be determined only by trial and not by admission. A plea of guilt expresses the defendant's belief that his acts were proscribed by law and that he cannot successfully be defended. It is true, of course, that guilt under §215 of the Criminal Code, which makes it a crime to use the mails to defraud, depends upon answers to questions of law raised by application of the statute to particular facts. It is equally true that prosecutions under other provisions of the Criminal Code may raise even more difficult and complex questions of law. But such questions are no less absent when a man pleads guilty than when he resists an accusation of crime. And not even now is it suggested that a layman cannot plead guilty unless he has the opinion of a lawyer on the questions of law that might arise if he did not admit his guilt. Plainly, the engrafting of such a requirement upon the Constitution would be a gratuitous dislocation of the processes of justice. The task of judging the competence of a particular accused cannot be escaped by announcing delusively simple rules of trial procedure which judges must mechanically follow. The question in each case is whether the accused was competent to exercise an intelligent, informed judgment—and for determination of this question it is of course relevant whether he had the advice of counsel. But it is quite another matter to suggest that the Constitution unqualifiedly deems an accused incompetent unless he does have the advice of counsel. If a layman is to be precluded from defending himself because the Constitution is said to make him helpless without a lawyer's assistance on questions of law which

abstractly underlie all federal criminal prosecutions, it ought not to matter whether the decision he is called upon to make is that of pleading guilty or of waiving a particular mode of trial. Every conviction, including the considerable number based upon pleas of guilty, presupposes at least a tacit disposition of the legal questions involved.

We have already held that one charged with a serious federal crime may dispense with his Constitutional right to jury trial, where this action is taken with his express, intelligent consent, where the Government also consents, and where such action is approved by the responsible judgment of the trial court. *Patton v. United States*, 281 U.S. 276. (\*) And whether or not there is an intelligent, competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case. The less rigorous enforcement of the rules of evidence, the greater informality in trial procedure—these are not the only advantages that the absence of a jury may afford to a layman who prefers to make his own defense. In a variety of subtle ways trial by jury may be restrictive of a layman's opportunities to present his case as freely as he wishes. And since trial by jury confers burdens as well as benefits, an accused should be permitted to forego its privileges when his competent judgment counsels him that his interests are safer in the keeping of the judge than of the jury.

But we are asked here to hold that an accused person cannot waive trial by jury, no matter how freely and understandingly he surrenders that right, unless he acts on a lawyer's advice. In other words, although a shrewd and experienced layman may, for his own sufficient reasons, conduct his own defense if he prefers to do so, nevertheless if he does do so the Constitution requires that he must defend himself before a jury and not before a judge. But we find nothing in the Constitution, or in the great historic events which gave rise to it, or the history to which it has given rise, to justify such interpolation into the Constitution and such restriction upon the rational administration of criminal justice.

The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. The public conscience must be satisfied that fairness dominates the administration of justice. An accused must have

the means of presenting his best defense. He must have time and facilities for investigation and for the production of evidence. But evidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively in court. But the Constitution does not force a lawyer upon a defendant. He may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open. . . .

Referring to jury trials, Mr. Justice Cardozo, speaking for the Court, had occasion to say, "Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them." *Palko v. Connecticut*, 302 U.S. at 325. Putting this thought in more generalized form, the procedural safeguards of the Bill of Rights are not to be treated as mechanical rigidities. What were contrived as protections for the accused should not be turned into fetters. To assert as an absolute that a layman, no matter how wise or experienced he may be, is incompetent to choose between judge and jury as the tribunal for determining his guilt or innocence, simply because a lawyer has not advised him on the choice, is to dogmatize beyond the bounds of learning or experience. Were we so to hold, we would impliedly condemn the administration of criminal justice in States deemed otherwise enlightened, merely because in their courts the vast majority of criminal cases are tried before a judge without a jury. To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is to impair the worth of great Constitutional safeguards by treating them as empty verbalisms.

Underlying such dogmatism is distrust of the ability of courts to accommodate judgment to the varying circumstances of individual cases. But this is to express want of faith in the very tribunals which are charged with enforcement of the Constitution. "Universal distrust," Mr. Justice Holmes admonished us, "creates universal incompetence." . . . When the administration of the criminal law in the federal courts is hedged about as it is by the Constitutional safeguards for the protection of an accused, to deny him in the exercise of his free choice the right to dispense with some of these safeguards . . . and to base such denial on an arbitrary rule that a man can not choose to conduct his defense before a judge rather than a jury

unless, against his will, he has a lawyer to advise him, although he reasonably deems himself the best advisor for his own needs, is to imprison a man in his privileges and call it the Constitution. For it is neither obnoxious to humane standards for the administration of justice as these have been written into the Constitution, nor violative of the rights of any person accused of crime who is capable of weighing his own best interest, to permit him to conduct his own defense in a trial before a judge without a jury, subject as such trial is to public scrutiny and amenable as it is to the corrective oversight of an appellate tribunal and ultimately of the Supreme Court of the Nation.

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"EACH STATE IS FREE TO DEVISE ITS OWN WAY  
OF SECURING ESSENTIAL JUSTICE"

*Hysler v. Florida*

315 U.S. 411 (1942)

When the United States Supreme Court declined in 1935 to reverse Tom Mooney's 1917 conviction and advised him first to exhaust his remedies in the state courts, it did so only after laying down the rule that the use by a state of testimony known by its "prosecuting authorities" to be false is a denial of due process. *Mooney v. Holohan*, 294 U.S. 103. This principle was invoked by Hysler when he sought to have the Court reverse the decision of the Supreme Court of Florida rejecting his claim that his conviction for murder in 1936 had been secured through false testimony.

On the eve of his own electrocution four years after the crime was committed, one of Hysler's accomplices exonerated him and swore that he had been forced by state officials to perjure himself at Hysler's trial. Relying on this recantation, Hysler petitioned the Florida Supreme Court for permission to apply to the trial court to have a jury pass on his complaint that his conviction had been obtained by unlawful means. But Florida's highest court found that he had not substantiated this claim and denied his request.

Dividing six to three, the Supreme Court in an opinion by Justice

Frankfurter affirmed the judgment of the Supreme Court of Florida. It held that the procedure provided by Florida for correcting the kind of miscarriage of justice of which Hysler was complaining met the requirements of due process. The Court was satisfied, after examining his affidavits, that Hysler had not made "an adequate showing of the substantiality of his claim."

In his dissenting opinion, concurred in by Justices Douglas and Murphy, Mr. Justice Black strongly implied that the minority would have disposed of the case on the basis of those decisions holding that "a conviction based on confessions wrung from the accused or his accomplices by third-degree methods was offensive to the guarantees of the due process clause." However, since the exact ground for the Florida Supreme Court's decision was ambiguous, he thought that the case should have been remanded, in order to determine whether it rejected Hysler's petition because it was not convinced that its allegations were true or because, even if true, they did not establish denial of due process.

Mr. Justice Frankfurter's opinion for the Court read in part:

After the Supreme Court of Florida had affirmed his conviction for murder, the petitioner applied to that court for leave to ask the trial court to review the judgment of conviction. The basis of his application was the claim that the testimony of two witnesses implicating him was perjured, and that they had testified falsely against him because they were "coerced, intimidated, beaten, threatened with violence and otherwise abused and mistreated" by the police and were "promised immunity from the electric chair" by the district attorney. After twice considering the matter, the Supreme Court of Florida denied the application. . . . We brought the case here, . . . in view of our solicitude, especially where life is at stake, for those liberties which are guaranteed by the Due Process Clause of the Fourteenth Amendment.

The guides for decision are clear. If a state, whether by the active conduct or the connivance of the prosecution, obtains a conviction through the use of perjured testimony, it violates civilized standards for the trial of guilt or innocence and thereby deprives an accused of liberty without due process of law. *Mooney v. Holohan*, 294 U.S. 103. Equally offensive to the Constitutional guarantees of liberty are confessions wrung from an accused by overpowering his will, whether through physical violence or the more subtle forms of



coercion commonly known as "the third degree." . . . In this collateral attack upon the judgment of conviction, the petitioner bases his claim on the recantation of one of the witnesses against him. He cannot, of course, contend that mere recantation of testimony is in itself ground for invoking the Due Process Clause against a conviction. However, if Florida through her responsible officials knowingly used false testimony which was extorted from a witness "by violence and torture," one convicted may claim the protection of the Due Process Clause against a conviction based upon such testimony.

And so we come to the circumstances of this case.

On November 25, 1936, as a result of an attempted robbery, John H. Surrency and his wife, Mayme Elizabeth, were murdered. On December 16, 1936, Hysler was indicted for the murder of John Surrency; he was tried on January 21, 1937, was convicted on February 12, 1937, with recommendation of mercy, and was thereafter sentenced to imprisonment for life. On February 3, 1938, his sentence was affirmed by the Florida Supreme Court. . . . The record in this case was more than 3000 pages. On January 15, 1937, Hysler, together with two others, James Baker and Alvin Tyler, was indicted for the murder of Mrs. Surrency. A severance having been granted as to Tyler and Baker, Hysler was placed on trial on March 15, 1937, and on April 5 was found guilty without recommendation of mercy. On April 23, 1937, he was sentenced to death. On April 24 he sued out a writ of error to the state Supreme Court, which on February 3, 1938, sustained the sentence, and on June 3 denied a rehearing. The record on this second trial was some 2500 pages. . . .

Surrency kept a restaurant near Jacksonville, and on the fatal day was returning from one of his regular and well-known trips to that city to get checks cashed. Hysler had known Baker in connection with Hysler's illicit whiskey business. Baker and Tyler were friends. The principal evidence in both trials against Hysler was their testimony. They testified with circumstantiality that Hysler induced them to hold up Surrency, furnished them a car, a pistol, and some whiskey, gave them detailed instructions for carrying out the plan, and by prearrangement was in the vicinity of the place of its execution. While their testimony doubtless was the foundation of Hysler's convictions, the testimony both of numerous witnesses and Hysler himself sheds much confirming light on the story told by Baker and Tyler. . . .

Accordingly, the date for the execution was set by the Governor of Florida for the week of February 20, 1939. In the meantime, however, an application for a writ of *habeas corpus* by Hysler was made to the Supreme Court of Florida, partly on the ground of insanity. This was denied by that Court on February 20, 1939. . . . Tyler broke jail and has apparently remained a fugitive from justice. Baker was tried after Hysler, was convicted of murder in the first degree, and sentenced to death. His conviction was affirmed by the Florida Supreme Court on March 14, 1939, and a rehearing denied on April 11, 1939. . . .

We have now reached the final chapter of this unedifying story in the administration of criminal justice. On April 10, 1941, more than four years after Hysler's conviction for the murder of Mrs. Surrency, he petitioned the Supreme Court of Florida for permission to apply to the Circuit Court of Duval County, Florida (the court before which he was originally tried), for writ of error *coram nobis*. This common law writ, in its local adaptation, is Florida's response to the requirements of *Mooney v. Holohan*, 294 U.S. 103, for the judicial correction of a wrong committed in the administration of criminal justice and resulting in the deprivation of life or liberty without due process. . . . In brief, a person in Florida who claims that his incarceration is due to "failure to observe that fundamental fairness essential to the very concept of justice," . . . even after his sentence has been duly affirmed by the highest court of the State, has full opportunity to have a jury pass on such a claim provided he first makes an adequate showing of the substantiality of his claim to the satisfaction of the Supreme Court of Florida. The decisions of that Court show that a naked allegation that a constitutional right has been invaded is not sufficient. A petitioner must "make a full disclosure of the specific facts relied on," and not merely his conclusions "as to the nature and effect of such facts." The proof must enable the appellate court to "ascertain whether, under settled principles pertaining to such writ, the facts alleged would afford, at least *prima facie*, just ground for an application to the lower court for a writ of error *coram nobis*." . . .

Such a state procedure of course meets the requirements of the Due Process Clause. Vindication of Constitutional rights under the Due Process Clause does not demand uniformity of procedure by the forty-eight States. Each State is free to devise its own way of

securing essential justice in these situations. The Due Process Clause did not stereotype the means for ascertaining the truth of a claim that that which duly appears as the administration of intrinsic justice was such merely in form, that in fact it was a perversion of justice by the law officers of the State. Each State may decide for itself whether, after guilt has been determined by the ordinary processes of trial and affirmed on appeal, a later challenge to its essential justice must come in the first instance, or even in the last instance, before a bench of judges rather than before a jury.

Florida then had ample machinery for correcting the Constitutional wrong of which Hysler complained. But it remains to consider whether in refusing him relief the Supreme Court of Florida denied a proper appeal to its corrective process for protecting a right guaranteed by the Fourteenth Amendment.

Hysler's claim before the Supreme Court of Florida was that Baker repudiated his testimony insofar as it implicated Hysler and that he now named another man as the instigator of the crime. Considering the fact that this repudiation came four years after leaden-footed justice had reached the end of the familiar trail of dilatory procedure, and that Baker now pointed to an instigator who was dead, the Supreme Court of Florida had every right and the plain duty to scrutinize this repudiation with a critical eye, in the light of its familiarity with the facts of this crime as they had been adduced in three trials, the voluminous records of which had been before that Court. (\*)

The Florida Supreme Court had before it four affidavits by Baker. The affidavits must be considered here as they were before that Court—in their entirety. One was made on April 7, 1941; the second on April 8 between six and seven in the evening; another between eight-thirty and nine of the same night; the fourth, the next day. The most striking feature of this series of retractions is that, in his first and spontaneous new account of the happenings that led to the murders on November 25, 1936, Baker does not attribute to coercion or inducements made by state authorities his testimony at the trials that Hysler was the instigator of the crimes. On the contrary, according to Baker's new story, after the killing of the Surrencys, Tyler and he "agreed between them while they were in Cracker Swamp in the Marietta section of Duval County, that they would lay the blame of the planning of the robbery of the Surrencys upon

Clyde Hysler because they had had considerable liquor dealings with Clyde Hysler and knew him well, and for the reason that the Hyslers bore a bad reputation in Duval County, and for the further reason that Clyde Hysler's father had plenty of money and they thought that by laying the planning of the robbery of the Surrencys on Clyde Hysler that his father and his other relatives would put up sufficient money to get Clyde Hysler out of the trouble and that by laying it on to Clyde Hysler, that he, James Baker, and Alvin Tyler would escape the death penalty. . . . ”

There is no suggestion whatever in this explanation of what is now claimed to have been a false accusation that it was induced from without. Baker gives five reasons for having fixed the blame on Hysler—an explanation to which he had adhered for more than four years—but all these reasons make Baker and Tyler the spontaneous concocters of the alleged false charge. It was not until the next day, that Baker, under leading questions, suggested that his account of the crime, contemporaneous with it, was induced by the hope of getting “life instead of the chair.” (\*) Even in this second affidavit there is no hint that the prosecutor had any knowledge of the falsity of his implication of Hysler. (\*) Only after a third session did Baker, in an ambiguous reply to another leading question, convey a suggestion of the prosecutor's knowledge of the use of force preceding Baker's original testimony. This is the only testimony that bears on the complicity of the prosecutor in the alleged coercion of Baker's testimony:

“Q. Baker do you know whether or not Mr. Harrell [the State's Attorney] knew if you was beat up to make you testify?

“A. Yes, sir, he knows I couldn't set down, none of the sheriff's force knew it at the time, they knew it later when I made it in front all of the officers.

“Q. When you made that statement you couldn't set down?

“A. Yes, sir, and I can't set down good, and I wish you and those men could see that now.

“Q. No, we want care to see—that's all you want to say.

“A. (Baker nodding his head indicating yes.)”

In his final affidavit on April 9, Baker returns to the alleged promise of the State's Attorney that he would not “burn” him. But there is this time no suggestion that the prosecutor induced or knew of any false testimony by Baker.

We have seen that, according to Baker's first statement on April 7, his attribution of Hysler's responsibility was spontaneous and uncoerced. The circumstances of the case reinforce this and cast a proper scepticism upon Baker's subsequent claims of coercion. According to the affidavits of the two lawyers who represented Hysler at his trials, they examined Baker and Tyler "at great length" in the presence of counsel for the two accomplices and "said witnesses were particularly questioned as to who was involved in said case, and said witnesses denied that anyone was involved in said case other than the defendants named in the indictment; that said witnesses further denied that any statements previously made by them to law enforcement officers were made under duress or with any hope or expectation of reward." And the present Chief Justice of Florida, in his separate opinion on Baker's appeal, characterized Baker's confession as "entirely free and voluntary." . . .

In addition to these four affidavits by Baker, there were four subsidiary affidavits by others. Their want of significance is sufficiently attested by the fact that on the motion for rehearing of this cause before the Florida Supreme Court, reliance was placed exclusively upon the Baker affidavits and no reference whatever was made to these subsidiary affidavits. Nor was reliance upon them made here.

The essence of Hysler's claim before the Supreme Court of Florida was that his conviction was secured by unconstitutional means, that Baker was coerced to testify falsely by responsible state officials. The Court had to judge the substantiality of this claim on the basis of all that was before it, namely, the petition with its accompanying affidavits and the records of prior cases arising out of the same crime. The Court concluded that Hysler's proof did not make out a *prima facie* case for asking the trial court to reconsider its judgment of conviction. However ineptly the Florida Supreme Court may have formulated the grounds for denying the application, its action leaves no room for doubt that the Court deemed the petitioner's claim without substantial foundation. We construe its finding that the "petition" did not show the responsibility of the state officials for the alleged falsity of Baker's original testimony to mean that the petitioner had failed to make the showing of substantiality which, according to the local procedure of Florida, was necessary in order to obtain the extraordinary relief furnished by the writ of

error *coram nobis*.(\*) And our independent examination of the affidavits upon which his claim was based leaves no doubt that the finding of insubstantiality was justified. It certainly precludes a holding that such a finding was not justified.

The State's security in the just administration of its criminal law must largely rest upon the competence of its trial courts. But that does not bar the state Supreme Court from exercising the vigilance of a hardheaded consideration of appeals to it for upsetting a conviction. That in the course of four years witnesses die or disappear, that memories fade, that a sense of responsibility may become attenuated, that repudiations and new incriminations like Baker's on the eve of execution are not unfamiliar as a means of relieving others or as an irrational hope for self—these of course are not valid considerations for relaxing the protection of Constitutional rights. But they are relevant in exercising a hardy judgment in order to determine whether such a belated disclosure springs from the impulse for truth-telling or is the product of self-delusion or artifice prompted by the instinct of self-preservation.

Our ultimate inquiry is whether the State of Florida has denied to the petitioner the protection of the Due Process Clause. The record does not permit the conclusion that Florida has deprived him of his Constitutional rights.

. . . . .

“THE POLICE MUST WITH REASONABLE PROMPTNESS SHOW LEGAL  
CAUSE FOR DETAINING ARRESTED PERSONS”

*McNabb v. United States*

318 U.S. 332 (1943)

Arrested in connection with the fatal shooting of an officer of the Alcohol Tax Unit of the Internal Revenue Bureau, the petitioners in this case were detained and questioned for many hours without being taken to a United States Commissioner or judge. Contending that the circumstances under which their confessions were obtained revealed the use of coercion, they appealed to the Supreme Court to reverse their convictions on the ground that the admission of these statements was con-

trary to the provision in the Fifth Amendment against self-incrimination.

In an opinion by Justice Frankfurter, the Court reversed the convictions, but without passing judgment on this constitutional objection. It simply held that the conduct of the law enforcement authorities was contrary to the act of Congress which requires federal arresting officers to take the arrested person before the nearest United States Commissioner or judicial officer. Justice Reed dissented, both because he regarded the confessions as voluntary and because he thought that the rule that arrested persons must be promptly brought before a committing magistrate was not capable of enforcement as effectively as the rule against coerced confessions.

Mr. Justice Frankfurter spoke for the majority in the McNabb case, saying in part:

. . . . .

On the afternoon of Wednesday, July 31, 1940, information was received at the Chattanooga office of the Alcoholic Tax Unit that several members of the McNabb family were planning to sell that night whiskey on which federal taxes had not been paid. The McNabbs were a clan of Tennessee mountaineers living about twelve miles from Chattanooga in a section known as the McNabb Settlement. Plans were made to apprehend the McNabbs while actually engaged in their illicit enterprise. That evening four revenue agents, accompanied by the Government's informers, drove to the McNabb Settlement. When they approached the rendezvous arranged between the McNabbs and the informers, the officers got out of the car. The informers drove on and met five of the McNabbs, of whom three—the twin brothers Freeman and Raymond, and their cousin Benjamin—are the petitioners here. (The two others, Emuil and Barney McNabb, were acquitted at the direction of the trial court.) The group proceeded to a spot near the family cemetery where the liquor was hidden. While cans containing whiskey were being loaded into the car, one of the informers flashed a pre-arranged signal to the officers who thereupon came running. One of these called out, "All right, boys, federal officers!", and the McNabbs took flight.

Instead of pursuing the McNabbs, the officers began to empty the cans. They heard noises coming from the direction of the cemetery, and after a short while a large rock landed at their feet. An officer named Leeper ran into the cemetery. He looked about with

his flashlight but discovered no one. Noticing a couple of whiskey cans there, he began to pour out their contents. Shortly afterwards the other officers heard a shot; running into the cemetery they found Leeper on the ground, fatally wounded. A few minutes later—at about ten o'clock—he died without having identified his assailant. A second shot slightly wounded another officer. A search of the cemetery proved futile, and the officers left.

About three or four hours later—between one and two o'clock Thursday morning—federal officers went to the home of Freeman, Raymond, and Emuil McNabb and there placed them under arrest. Freeman and Raymond were twenty-five years old. Both had lived in the Settlement all their lives; neither had gone beyond the fourth grade in school; neither had ever been farther from his home than Jasper, twenty-one miles away. Emuil was twenty-two years old. He, too, had lived in the Settlement all his life, and had not gone beyond the second grade.

Immediately upon arrest, Freeman, Raymond, and Emuil were taken directly to the Federal Building at Chattanooga. They were not brought before a United States commissioner or a judge. Instead, they were placed in a detention room (where there was nothing they could sit or lie down on, except the floor), and kept there for about fourteen hours, from three o'clock Thursday morning until five o'clock that afternoon. They were given some sandwiches. They were not permitted to see relatives and friends who attempted to visit them. They had no lawyer. There is no evidence that they requested the assistance of counsel, or that they were told that they were entitled to such assistance.

Barney McNabb, who had been arrested early Thursday morning by the local police, was handed over to the federal authorities about nine or ten o'clock that morning. He was twenty-eight years old; like the other McNabbs he had spent his entire life in the Settlement, had never gone beyond Jasper, and his schooling stopped at the third grade. Barney was placed in a separate room in the Federal Building where he was questioned for a short period. The officers then took him to the scene of the killing, brought him back to the Federal Building, questioned him further for about an hour, and finally removed him to the county jail three blocks away.

In the meantime, direction of the investigation had been assumed by H. B. Taylor, district supervisor of the Alcohol Tax Unit, with



headquarters at Louisville, Kentucky. Taylor was the Government's chief witness on the central issue of the admissibility of the statements made by the McNabbs. Arriving in Chattanooga early Thursday morning, he spent the day in study of the case before beginning his interrogation of the prisoners. Freeman, Raymond, and Emuil, who had been taken to the county jail about five o'clock Thursday afternoon, were brought back to the Federal Building early that evening. According to Taylor, his questioning of them began at nine o'clock. Other officers set the hour earlier. (\*)

Throughout the questioning, most of which was done by Taylor, at least six officers were present. At no time during its course was a lawyer or any relative or friend of the defendants present. Taylor began by telling "each of them before they were questioned that we were Government officers, what we were investigating, and advised them that they did not have to make a statement, that they need not fear force, and that any statement made by them would be used against them, and that they need not answer any questions asked unless they desired to do so."

The men were questioned singly and together. As described by one of the officers, "They would be brought in, be questioned possibly at various times, some of them half an hour, or maybe an hour, or maybe two hours." Taylor testified that the questioning continued until one o'clock in the morning, when the defendants were taken back to the county jail. (\*)

The questioning was resumed Friday morning, probably sometime between nine and ten o'clock. (\*) "They were brought down from the jail several times, how many I don't know. They were questioned one at a time, as we would finish one he would be sent back and we would try to reconcile the facts they told, connect up the statements they made, and then we would get two of them together. I think at one time we probably had all five together trying to reconcile their statements . . . When I knew the truth I told the defendants what I knew. I never called them damned liars, but I did say they were lying to me. . . . It would be impossible to tell all the motions I made with my hands during the two days of questioning, however, I didn't threaten anyone. None of the officers were prejudiced towards these defendants nor bitter toward them. We were only trying to find out who killed our fellow officer."

Benjamin McNabb, the third of the petitioners, came to the office

of the Alcohol Tax Unit about eight or nine o'clock Friday morning and voluntarily surrendered. Benjamin was twenty years old, had never been arrested before, had lived in the McNabb Settlement all his life, and had not got beyond the fourth grade in school. He told the officers that he had heard that they were looking for him but that he was entirely innocent of any connection with the crime. The officers made him take his clothes off for a few minutes because, so he testified, "they wanted to look at me. This scared me pretty much."(\*) He was not taken before a United States Commissioner or a judge. Instead, the officers questioned him for about five or six hours. When finally in the afternoon he was confronted with the statement that the others accused him of having fired both shots, Benjamin said, "If they are going to accuse me of that, I will tell the whole truth; you may get your pencil and paper and write it down." He then confessed that he had fired the first shot, but denied that he had also fired the second.

Because there were "certain discrepancies in their stories, and we were anxious to straighten them out," the defendants were brought to the Federal Building from the jail between nine and ten o'clock Friday night. They were again questioned, sometimes separately, sometimes together. Taylor testified that "We had Freeman McNabb on the night of the second [Friday] for about three and one-half hours. I don't remember the time but I remember him particularly because he certainly was hard to get anything out of. He would admit he lied before, and then tell it all over again. I knew some of the things about the whole truth and it took about three and one-half hours before he would say it was the truth, and I finally got him to tell a story which he said was true and which certainly fit better with the physical facts and circumstances than any other story he had told. It took me three and one-half hours to get a story that was satisfactory or that I believed was nearer the truth than when we started."

The questioning of the defendants continued until about two o'clock Saturday morning, when the officers finally "got all the discrepancies straightened out." Benjamin did not change his story that he had fired only the first shot. Freeman and Raymond admitted that they were present when the shooting occurred, but denied Benjamin's charge that they had urged him to shoot. Barney and Emul, who were acquitted at the direction of the trial court, made

Concededly, the admissions made by Freeman, Raymond and Benjamin constituted the crux of the Government's case against them, and the convictions cannot stand if such evidence be excluded. Accordingly, the question for our decision is whether these incriminating statements, made under the circumstances we have summarized, (\*) were properly admitted. Relying upon the guarantees of the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law," the petitioners contend that the Constitution itself forbade the use of this evidence against them. The Government counters by urging that the Constitution proscribes only "involuntary" confessions, and that judged by appropriate criteria of "voluntariness" the petitioners' admissions were voluntary and hence admissible.

It is true, as the petitioners assert, that a conviction in the federal courts, the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand. . . . And this Court has, on Constitutional grounds, set aside convictions, both in the federal and state courts, which were based upon confessions "secured by protracted and repeated questioning of ignorant and untutored persons, in whose minds the power of officers was greatly magnified," . . . or "who have been unlawfully held incommunicado without advice of friends or counsel," . . .

In the view we take of the case, however, it becomes unnecessary to reach the Constitutional issue pressed upon us. For, while the power of this Court to undo convictions in state courts is limited to the enforcement of those "fundamental principles of liberty and justice" . . . which are secured by the Fourteenth Amendment, the scope of our reviewing power over convictions brought here from the federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force. Moreover, review by this Court of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdic-

tion. Considerations of large policy in making the necessary accommodations in our federal system are wholly irrelevant to the formulation and application of proper standards for the enforcement of the federal criminal law in the federal courts.

The principles governing the admissibility of evidence in federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, . . . this Court has, from the very beginning of its history, formulated rules of evidence to be applied in federal criminal prosecutions. . . . And in formulating such rules of evidence for federal criminal trials the Court has been guided by considerations of justice not limited to the strict canons of evidentiary relevance.

Quite apart from the Constitution, therefore, we are constrained to hold that the evidence elicited from the petitioners in the circumstances disclosed here must be excluded. For in their treatment of the petitioners the arresting officers assumed functions which Congress has explicitly denied them. They subjected the accused to the pressures of a procedure which is wholly incompatible with the vital but very restricted duties of the investigating and arresting officers of the Government and which tends to undermine the integrity of the criminal proceeding. Congress has explicitly commanded that "It shall be the duty of the marshal, his deputy, or other officer, who may arrest a person charged with any crime or offense, to take the defendant before the nearest United States commissioner or the nearest judicial officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial . . ." 18 U.S.C. §595. Similarly, the Act of June 18, 1934, . . . authorizing officers of the Federal Bureau of Investigation to make arrests, requires that "the person arrested shall be immediately taken before a committing officer." Compare also the Act of March 1, 1879, . . . which provides that when arrests are made of persons in the act of operating an illicit distillery, the arrested persons shall be taken forthwith before some judicial officer residing in the county where the arrests were made, or if none, in the county nearest to the place of arrest. Similar legislation, requiring that arrested persons be promptly taken before a committing authority, appears on the statute books of nearly all the states. (\*)

The purpose of this impressively pervasive requirement of crimi-

nal procedure is plain. A democratic society, in which respect for the dignity of all men is central, naturally guards against the misuse of the law enforcement process. Zeal in tracking down crime is not in itself an assurance of soberness of judgment. Disinterestedness in law enforcement does not alone prevent disregard of cherished liberties. Experience has therefore counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic. The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for its vindication. Legislation such as this, requiring that the police must with reasonable promptness show legal cause for detaining arrested persons, constitutes an important safeguard—not only in assuring protection for the innocent but also in securing conviction of the guilty by methods that commend themselves to a progressive and self-confident society. For this procedural requirement checks resort to those reprehensible practices known as the “third degree” which, though universally rejected as indefensible, still find their way into use. It aims to avoid all the evil implications of secret interrogation of persons accused of crime. It reflects not a sentimental but a sturdy view of law enforcement. It outlaws easy but self-defeating ways in which brutality is substituted for brains as an instrument of crime detection. (\*) A statute carrying such purposes is expressive of a general legislative policy to which courts should not be heedless when appropriate situations call for its application.

The circumstances in which the statements admitted in evidence against the petitioners were secured reveal a plain disregard of the duty enjoined by Congress upon federal law officers. Freeman and Raymond McNabb were arrested in the middle of the night at their home. Instead of being brought before a United States commissioner or a judicial officer, as the law requires, in order to determine the sufficiency of the justification for their detention, they were put in a barren cell and kept there for fourteen hours. For two days they were subjected to unremitting questioning by numerous officers. Benjamin's confession was secured by detaining him unlawfully and questioning him continuously for five or six hours. The McNabbs had to submit to all this without the aid of friends or the

benefit of counsel. The record leaves no room for doubt that the questioning of the petitioners took place while they were in the custody of the arresting officers and before any order of commitment was made. Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves accomplices in willful disobedience of law. Congress has not explicitly forbidden the use of evidence so procured. But to permit such evidence to be made the basis of a conviction in the federal courts would stultify the policy which Congress has enacted into law.

Unlike England, where the Judges of the King's Bench have prescribed rules for the interrogation of prisoners while in the custody of police officers, (\*) we have no specific provisions of law governing federal law enforcement officers in procuring evidence from persons held in custody. But the absence of specific restraints going beyond the legislation to which we have referred does not imply that the circumstances under which evidence was secured are irrelevant in ascertaining its admissibility. The mere fact that a confession was made while in the custody of the police does not render it inadmissible. . . . But where in the course of a criminal trial in the federal courts it appears that evidence has been obtained in such violation of legal rights as this case discloses, it is the duty of the trial court to entertain a motion for the exclusion of such evidence and to hold a hearing, as was done here, to determine whether such motion should be granted or denied. . . . The interruption of the trial for this purpose should be no longer than is required for a competent determination of the substantiality of the motion. As was observed in the *Nardone* case, . . . "The civilized conduct of criminal trials cannot be confined within mechanical rules. It necessarily demands the authority of limited direction entrusted to the judge presiding in federal trials, including a well-established range of judicial discretion, subject to appropriate review on appeal, in ruling upon preliminary questions of fact. Such a system as ours must, within the limits here indicated, rely on the learning, good sense, fairness and courage of federal trial judges." 308 U.S. at 342.

In holding that the petitioners' admissions were improperly received in evidence against them, and that having been based on

this evidence their convictions cannot stand, we confine ourselves to our limited function as the court of ultimate review of the standards formulated and applied by federal courts in the trial of criminal cases. We are not concerned with law enforcement practices except in so far as courts themselves become instruments of law enforcement. We hold only that a decent regard for the duty of courts as agencies of justice and custodians of liberty forbids that men should be convicted upon evidence secured under circumstances revealed here. In so doing, we respect the policy which underlies Congressional legislation. The history of liberty has largely been the history of observance of procedural safeguards. And the effective administration of criminal justice hardly requires disregard of fair procedures imposed by law.

#### RIGHT TO COUNSEL IN STATE CRIMINAL TRIALS

*Carter v. Illinois*

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329 U.S. 173 (1946)

The Sixth Amendment to the United States Constitution provides that in all federal criminal prosecutions the accused "shall enjoy the right . . . to have the assistance of counsel for his defense." When the Supreme Court held in 1932 in the first of the Scottsboro cases (*Powell v. Alabama*, 287 U.S. 45) that representation by counsel is inherent in due process and is therefore required of the states by the Fourteenth Amendment, many of those who welcomed this pronouncement jumped to the conclusion that the Court was making the provision of the Sixth Amendment an absolute requirement for the states. It was not fully appreciated that the Court decided the case under the impact of the shocking way in which the particular defendants had been convicted for the crime most detested in a southern community, and that all the Court was saying was that in certain situations effective representation by counsel is indispensable to fundamental fairness in the conduct of criminal trials. As Justice Sutherland said: "All that is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble-mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law;

and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."

Among the citizens who hailed the decision in *Powell v. Alabama* as "a notable chapter in the history of liberty" was Professor Frankfurter, except that he was quick to caution that it did not mean that henceforth the Supreme Court would or could supervise criminal justice in the forty-eight states. "The *Scottsboro* case announces the doctrine," he wrote in the *New York Times* for November 13, 1932, "that to every defendant must be assured the minimum conditions for an ordered and reasoned investigation of the charges against him—a proper and a heartening guarantee of fundamental law. . . . In no sense is the Supreme Court a general tribunal for the correction of criminal errors, such as the Court of Criminal Appeal in England. On a continent peopled by 120,000,000 that would be an impossible task; in a federal system it would be a function debilitating to the responsibility of state and local agencies. But the Court, though it will continue to act with hesitation, will not suffer, in its own scathing phrase, 'judicial murder.' Here lies perhaps the deepest significance of the case."

Still, many were shocked to find Justice Frankfurter ten years later voting with the majority in denying counsel in a case which seemed to sap the decision in *Powell v. Alabama* of its original significance. *Betts v. Brady*, 316 U.S. 455. Indicted for robbery and having no funds for a lawyer, *Betts* asked the judge to appoint one for him, but was told that in the particular county of Maryland where the case was being tried it was not the practice of courts to appoint counsel for indigent defendants except in cases of murder or rape. A majority of the Court, in an opinion by Justice Roberts, found that no unfairness had resulted to the defendant from the refusal to give him a lawyer and indicated that it would confine the decision in *Powell v. Alabama* to the circumstances disclosed in that case. Said Justice Roberts: "Due process of law is secured against invasion by the federal Government by the Fifth Amendment and is safeguarded against state action in identical words by the Fourteenth. The phrase formulates a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights. Its application is less a matter of rule. Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept there is always the danger of falling into the habit of formulating the guarantee into a set of hard and



fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed."

Justices Black, Douglas, and Murphy emphasized in dissent that the crime was a serious one and that it was impossible after the trial to determine whether assistance by a lawyer might have produced a different result. Justice Black stated: "A practice cannot be reconciled with 'common and fundamental ideas of fairness and right,' which subjects innocent men to increased dangers of conviction merely because of their poverty. Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant's case was adequately presented."

Since the decision in the Betts case, the Court has continued to be seriously split on the issue of when a lawyer must be appointed by state courts to represent indigent defendants. Mr. Justice Frankfurter has consistently maintained that the only constitutional question is whether failure to assign counsel resulted in fundamental unfairness. This attitude is well illustrated by his opinion in the Carter case, from which Justices Black, Douglas, Murphy, and Rutledge dissented. Carter appealed his conviction for murder on the ground that he had been denied the right to counsel contrary to the Fourteenth Amendment. The Illinois Supreme Court had found that after being advised of his rights Carter decided to dispense with a lawyer and to plead guilty.

Mr. Justice Frankfurter said in part:

. . . . .

In a series of cases of which *Moore v. Dempsey*, 261 U.S. 86, was the first, and *Ashcraft v. Tennessee*, 327 U.S. 274, the latest, we have sustained an appeal to the Due Process Clause of the Fourteenth Amendment for a fair ascertainment of guilt or innocence. Inherent in the notion of fairness is ample opportunity to meet an accusation. Under pertinent circumstances, the opportunity is ample only when an accused has the assistance of counsel for his defense. And the need for such assistance may exist at every stage of the prosecution, from arraignment to sentencing. This does not, however, mean that the accused may not make his own defense; nor does it prevent him from acknowledging guilt when fully advised of all its implications and capable of understanding them. Neither the historic conception of Due Process nor the vitality it derives from progressive standards of justice denies a person the right to defend himself or to confess guilt. Under appropriate circumstances

the Constitution requires that counsel be tendered; it does not require that under all circumstances counsel be forced upon a defendant. . . .

The solicitude for securing justice thus embodied in the Due Process Clause is not satisfied by formal compliance or merely procedural regularity. It is not conclusive that the proceedings resulting in incarceration are unassailable on the face of the record. A State must give one whom it deprives of his freedom the opportunity to open an inquiry into the intrinsic fairness of a criminal process even though it appears proper on the surface. *Mooney v. Holohan*, 294 U.S. 103. Questions of fundamental justice protected by the Due Process Clause may be raised, to use lawyers' language, *dehors* the record.

But the Due Process Clause has never been perverted so as to force upon the forty-eight States a uniform code of criminal procedure. Except for the limited scope of the federal criminal code, the prosecution of crime is a matter for the individual States. The Constitution commands the States to assure fair judgment. Procedural details for securing fairness it leaves to the States. It is for them, therefore, to choose the methods and practices by which crime is brought to book, so long as they observe those ultimate dignities of man which the United States Constitution assures. . . . Wide discretion must be left to the States for the manner of adjudicating a claim that a conviction is unconstitutional. States are free to devise their own systems of review in criminal cases. A State may decide whether to have direct appeals in such cases, and if so under what circumstances. . . . In respecting the duty laid upon them by *Mooney v. Holohan*, States have a wide choice of remedies. A State may provide that the protection of rights granted by the Federal Constitution be sought through the writ of *habeas corpus* or *coram nobis*. It may use each of these ancient writs in its common law scope, or it may put them to new uses; or it may afford remedy by a simple motion brought either in the court of original conviction or at the place of detention. . . . So long as the rights under the United States Constitution may be pursued, it is for a State and not for this Court to define the mode by which they may be vindicated.

An accused may have been denied the assistance of counsel under circumstances which constitute an infringement of the United

States Constitution. If the State affords no mode for redressing that wrong, he may come to the federal courts for relief. But where a remedy is provided by the State, a defendant must first exhaust it in the manner in which the State prescribes. . . . For the relation of the United States and the courts of the United States to the States and the courts of the States is a very delicate matter. . . . When a defendant, as here, invokes a remedy provided by the State of Illinois, the decision of the local court must be judged on the basis of the scope of the remedy provided and what the court properly had before it in such a proceeding. . . . The only thing before the Illinois Supreme Court was what is known under Illinois practice as the common law record. That record, as certified in this case, included only the indictment, the judgment on plea of guilty, the minute entry bearing on sentence, and the sentence. And so the very narrow question now before us is whether this common law record establishes that the defendant's sentence is void because in the proceedings that led to it he was denied the assistance of counsel.

This case is quite different from a case like *Rice v. Olson*, 324 U.S. 786. In that case the record properly before this Court contained specific allegations bearing on the disabilities of the defendant to stand prosecution without the aid of counsel. There was not, as we have here, an unchallenged finding by the trial court that the accused was duly apprised of his rights and, in awareness of them, chose to plead guilty. The judgment against Carter explicitly states:

"And the said defendant Harice Leroy Carter commonly known as Roy Carter having been duly arraigned and being called upon to plead expresses a desire to plead guilty to the crime of murder as charged in the indictment. Thereupon the Court fully explained to the Defendant Harice Leroy Carter commonly known as Roy Carter the consequence of such plea and of all his rights in the premises including the right to have a lawyer appointed by the Court to defend him and also of his right to a trial before a jury of twelve jurors sworn in open Court and of the degree of proof that would be required to justify a verdict of guilty against him under the plea of not guilty but the defendant Harice Leroy Carter commonly known as Roy Carter per-

sists in his desire to plead guilty and for a plea says he is guilty in manner and form as charged in the indictment."

This, then, is not a case in which intelligent waiver of counsel is a tenuous inference from the mere fact of a plea of guilty. . . . A fair reading of the judgment against Carter indicates a judicial attestation that the accused, with his rights fully explained to him, consciously chose to dispense with counsel. And there is nothing in the record to contradict the judicial finding. From the common law record, we do not know what manner of man the defendant was. Facts bearing on his maturity or capacity of comprehension, or on the circumstances under which a plea of guilty was tendered and accepted, are wholly wanting. We have only the fact that the trial judge explained what the plea of guilty involved. To be sure, the record does not show that the trial court spelled out with laborious detail the various degrees of homicide under Illinois law and the various defenses open to one accused of murder. But the Constitution of the United States does not require of a judge that he recite with particularity that he performed his duty.

The only peg on which the defendant seeks to hang a claim that his right to counsel was denied is the fact that the judge did assign him counsel when it came to sentencing. From this fact alone, we are asked to draw the inference that the accused was not capable of understanding the proceedings which led to his plea of guilty, and was therefore deprived of the indispensable assistance of counsel. We cannot take such a jump in reasoning. A trial court may justifiably be convinced that a defendant knows what he is about when he pleads guilty and that he rightly believes that a trial is futile because a defense is wanting. But the imposition of sentence presents quite different considerations. There a judge usually moves within a large area of discretion and doubts. Such is the situation under Illinois law. The range of punishment which a judge in Illinois may impose for murder is between fourteen years and death. It is a commonplace that no more difficult task confronts judges than the determination of punishment not fixed by statute. Even the most self-assured judge may well want to bring to his aid every consideration that counsel for the accused can appropriately urge. In any event, the designation of counsel to assist the accused at the sentencing stage of the prosecution in no wise implies that

the defendant was not capable of intelligent self-protection when he pleaded guilty. . . .

. . . . .

“AVOIDING THE DANGERS OF A POLICE STATE”

*Harris v. United States*

331 U.S. 145, 155 (1947)

Mr. Justice Frankfurter has dissented sharply in several recent cases concerned with unreasonable searches and seizures because he thought that the decisions in them seriously undermined the constitutional protection of the right of privacy. Both the Fourth Amendment and the self-incrimination clause of the Fifth are usually involved in such cases. The Fourth Amendment reads: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” Federal officials are forbidden by the Fifth Amendment to force any person “in any criminal case to be a witness against himself.”

Drawing a distinction between public documents and private papers, one of these decisions sustained a conviction growing out of violations of a gasoline rationing regulation, even though the incriminating excess ration coupons had been seized by federal agents without a warrant. *Davis v. United States*, 328 U.S. 582, 594 (1946). Without a search warrant or warrant for his arrest, the agents appeared at the filling station owned by Davis and purchased gasoline by paying twenty cents more than the ration price per gallon and without giving coupons. They first arrested the attendant and then Davis himself. After inspecting the pumps and discovering that more gasoline had been sold than was covered by the coupons, the agents asked to be admitted to the inner office where the coupons were kept. Davis first refused but eventually acquiesced and surrendered the coupons. At his trial for unlawful possession of ration coupons, Davis contended that there had been an unlawful search which resulted in seizure of the coupons, and that their use in evidence against him violated his rights under the Fourth and Fifth Amendments.

Justice Douglas in his opinion for the majority stressed that the ration

coupons had never become the private property of the owner but remained at all times the property of the government and were subject to inspection and recall: "Where the officers seek to inspect *public* documents at the place of business where they are required to be kept, permissible limits of persuasion are not so narrow as where *private* papers are sought. The demand is one of right. When the custodian is persuaded by argument that it is his duty to surrender them and he hands them over, duress and coercion will not be so readily implied as where private papers are involved."

With the aid of an exhaustive discussion of the history of the constitutional provisions with which the case was concerned, Mr. Justice Frankfurter sought to show in his dissenting opinion that the Court was forgetting the excesses which these safeguards were intended to eliminate. He was particularly alarmed by the view of the majority that there is less protection where public papers are involved: "Merely because there may be the duty to make documents available for litigation does not mean that police officers may forcibly or fraudulently obtain them. This protection of the right to be let alone except under responsible judicial compulsion is precisely what the Fourth Amendment meant to express and to safeguard." By way of emphasizing that the agents had a right to inspect the incriminating documents, Justice Douglas had noted that the filling station was "a place of business, not a private residence." This observation led Justice Frankfurter to express fear over its legal implications: "If this is an indirect way of saying that the Fourth Amendment only secures homes against unreasonable searches and seizures but not offices—private offices of physicians and lawyers, of trade unions and other organizations, of business and scientific enterprises—then indeed it would constitute a sudden and drastic break with the whole history of the Fourth Amendment and its applications by this Court. I cannot believe that a vast area of civil liberties was thus meant to be wiped out by a few words, without prior argument or consideration." Justices Murphy and Rutledge also dissented.

Justices Douglas and Frankfurter continued to debate these issues in another case decided on the same day. *Zap. v. United States*, 328 U.S. 624, 630. Zap had a contract with the Navy to conduct experimental work on airplane wings and to conduct test flights. He arranged with a pilot for such test flights for \$2500 but had him sign a blank check in which he filled in \$4000, and which he later included in his statement of costs to the Navy. Pursuant to the terms of his contract with the Government and specific statutory authorization, agents of the Federal Bureau of Investigation audited Zap's books and records at his place of business during business hours, with the consent and cooperation of his

employees. They requested and were given by the bookkeeper the canceled check, which was later admitted at the trial that resulted in Zap's conviction for defrauding the government by means of that check.

Again writing for the majority, Justice Douglas held that use of the canceled check did not violate Zap's rights under the Fourth and Fifth Amendments, saying: "Though consent to the inspection did not include consent to the taking of the check, there was no wrongdoing in the method by which the incriminating evidence was obtained. The waiver of such rights to privacy and immunity as petitioner had respecting this business undertaking for the Government made admissible in evidence all the incriminating facts." Since Zap had agreed to permit inspection, the search was lawful, and the agents could testify to everything they discovered in the course of their investigation. To reverse Zap's conviction merely because the check itself was admitted in evidence would be "to exalt a technicality to constitutional levels."

Conceding that the Government had authority to inspect Zap's books and records, and that therefore the search was legal, Justice Frankfurter nevertheless questioned the right of the Government to seize the canceled check and then to introduce it in evidence against Zap: "The constitutional prohibition is directed not only at illegal searches. It likewise condemns invalid seizures. . . . The legality of a search does not automatically legalize every accompanying seizure." He continued: "If, in the course of a valid search, materials are uncovered, the very possession or concealment of which is a crime, they may be seized. . . . But to seize for evidentiary use papers the possession of which involves no infringement of law, is a horse of a different color." He was joined in dissent by Justices Murphy and Rutledge.

But the ruling in the Harris case impressed Justice Frankfurter as even more of a threat to civil liberty than the Davis and Zap decisions. Harris was prosecuted for violating the Selective Service and Training Act of 1940. In the course of arresting him upon warrants charging violations of the Mail Fraud statute and the National Stolen Property Act, federal agents searched his apartment and found some draft cards in a bureau drawer. By a five to four decision, the Supreme Court held that the evidence which resulted in his conviction for possessing these cards was not obtained in violation of the provision of the Fourth Amendment against unreasonable searches and seizures, and that its use did not violate the privilege against self-incrimination under the Fifth Amendment.

The gist of Chief Justice Vinson's opinion for the majority seems to be that a search incident to an arrest may, under certain circumstances, extend beyond the person of the one arrested to the premises under

his immediate control: "In keeping the draft cards in his custody petitioner was guilty of a serious and continuing offense against the laws of the United States. A crime was thus being committed in the very presence of the agents conducting the search. Nothing in the decisions of this Court gives support to the suggestion that under such circumstances the law enforcement officials must impotently stand aside and refrain from seizing contraband material. If entry upon the premises be authorized and the search which follows be valid, there is nothing in the Fourth Amendment which inhibits the seizure by law-enforcement agents of government property the possession of which is a crime, even though the officers are not aware that such property is on the premises when the search is initiated."

Justices Frankfurter, Murphy, Jackson, and Rutledge dissented, all except Justice Rutledge writing opinions. Justices Murphy and Rutledge joined in the following opinion of Mr. Justice Frankfurter:

Because I deem the implications of the Court's decision to have serious threats to basic liberties, I consider it important to underscore my concern over the outcome of this case. In *Davis v. United States*, 328 U.S. 582, the Court narrowed the protection of the Fourth Amendment(\*) by extending the conception of "public records" for purposes of search without warrant.(\*) The Court now goes far beyond prior decisions in another direction—it permits rummaging throughout a house without a search warrant on the ostensible ground of looking for the instruments of a crime for which an arrest, but only an arrest, has been authorized. If only the fate of the Davises and the Harrises were involved, one might be brutally indifferent to the ways by which they get their deserts. But it is precisely because the appeal to the Fourth Amendment is so often made by dubious characters that its infringements call for alert and strenuous resistance. Freedom of speech, of the press, of religion, easily summon powerful support against encroachment. The prohibition against unreasonable search and seizure is normally invoked by those accused of crime, and criminals have few friends. The implications of such encroachment, however, reach far beyond the thief or the black-marketeer. I cannot give legal sanction to what was done in this case without accepting the implications of such a decision for the future, implications which portend serious threats against precious aspects of our traditional freedom.

If I begin with some general observations, it is not because I am



unmindful of Mr. Justice Holmes' caution that "General propositions do not decide concrete cases." *Lochner v. New York*, 198 U.S. 45, 76. Whether they do or not often depends on the strength of the conviction with which such "general propositions" are held. A principle may be accepted "in principle," but the impact of an immediate situation may lead to deviation from the principle. Or, while accepted "in principle," a competing principle may seem more important. Both these considerations have doubtless influenced the application of the search and seizure provisions of the Bill of Rights. Thus, one's views regarding circumstances like those here presented ultimately depend upon one's understanding of the history and the function of the Fourth Amendment. A decision may turn on whether one gives that Amendment a place second to none in the Bill of Rights, or considers it on the whole a kind of nuisance, a serious impediment in the war against crime.

The provenance of the Fourth Amendment bears on its scope. It will be recalled that James Otis made his epochal argument against general warrants in 1761.(\*) Otis' defense of privacy was enshrined in the Massachusetts Constitution of 1780 in the following terms:

"XIV. Every subject has a right to be secure from all unreasonable searches, and the seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest or seizure: and no warrant ought to be issued but in cases, and with the formalities, prescribed by the laws."

In the meantime, Virginia, in her first Constitution (1776), incorporated a provision on the subject narrower in scope:

"X. That general warrants, whereby an officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by

evidence, are grievous and oppressive, and ought not to be granted."

When Madison came to deal with safeguards against searches and seizures in the United States Constitution, he did not draw on the Virginia model but based his proposal on the Massachusetts form. This is clear proof that Congress meant to give wide, and not limited, scope to this protection against police intrusion.

Historically we are dealing with a provision of the Constitution which sought to guard against an abuse that more than any one single factor gave rise to American independence. John Adams surely is a competent witness on the causes of the American Revolution. And he it was who said of Otis' argument against search by the police, not unlike the one before us, "American independence was then and there born." . . . That which lay behind immunity from police intrusion without a search warrant was expressed by Mr. Justice Brandeis when he said that the makers of our Constitution

"conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment."

To be sure, that was said by him in a dissenting opinion in which he, with Mr. Justice Holmes, Mr. Justice Butler and Mr. Justice Stone applied the prohibition of the Fourth Amendment to wire-tapping without statutory authority. *Olmstead v. United States*, 277 U.S. 438, 478. But with only an occasional deviation, a series of decisions of this Court has construed the Fourth Amendment "liberally to safeguard the right of privacy." *United States v. Lefkowitz*, 285 U.S. 452, 464. . . . Thus, the federal rule established in *Weeks v. United States*, 232 U.S. 383, as against the rule prevailing in many States, renders evidence obtained through an improper search inadmissible no matter how relevant. . . . And long before the *Weeks* case, *Boyd v. United States*, 116 U.S. 616, gave legal effect to the broad historic policy underlying the Fourth Amendment. (\*) The *Boyd* opinion has been the guide to the interpretation of the

Fourth Amendment to which the Court has most frequently recurred.

It is significant that the constitution of every State contains a clause like that of the Fourth Amendment and often in its precise wording. Nor are these constitutional provisions historic survivals. New York was alone in not having a safeguard against unreasonable search and seizure in its constitution. In that State, the privilege of privacy was safeguarded by a statute. It tells volumes that in 1938, New York, not content with statutory protection, put the safeguard into its constitution. (\*) If one thing on this subject can be said with confidence it is that the protection afforded by the Fourth Amendment against search and seizure by the police, except under the closest judicial safeguards, is not an outworn bit of Eighteenth Century romantic rationalism but an indispensable need for a democratic society.

The Fourth Amendment, we have seen, derives from the similar provision in the first Massachusetts Constitution. We may therefore look to the construction which the early Massachusetts Court placed upon the progenitor of the Fourth Amendment:

"With the fresh recollection of those stirring discussions [respecting writs of assistance], and of the revolution which followed them, the article in the Bill of Rights, respecting searches and seizures, was framed and adopted. This article does not prohibit all searches and seizures of a man's person, his papers, and possessions; but such only as are 'unreasonable,' and the foundation of which is 'not previously supported by oath or affirmation.' The legislature were not deprived of the power to authorize search warrants for probable causes, supported by oath or affirmation, and for the punishment or suppression of any violation of law." *Commonwealth v. Dana*, 2 Met. (Mass.) 329, 336.

The plain import of this is that searches are "unreasonable" unless authorized by a warrant, and a warrant hedged about by adequate safeguards. "Unreasonable" is not to be determined with reference to a particular search and seizure considered in isolation. The "reason" by which search and seizure is to be tested is the "reason" that was written out of historic experience into the Fourth Amendment. This means that, with minor and severely confined exceptions,

inferentially a part of the Amendment, every search and seizure is unreasonable when made without a magistrate's authority expressed through a validly issued warrant.

It is noteworthy that Congress has consistently and carefully respected the privacy protected by the Fourth Amendment. Because they realized that the dangers of police abuse were persisting dangers, the Fathers put the Fourth Amendment into the Constitution. Because these dangers are inherent in the temptations and the tendencies of the police, Congress has always been chary in allowing the use of search warrants. When it has authorized them it has circumscribed their use with particularity. In scores upon score of Acts, Congress authorized search by warrant only for particular situations and in extremely restricted ways. Despite repeated importunities by Attorneys General of the United States, Congress long refused to make search by warrant generally available as a resource in aid of criminal prosecution. It did not do so until the first World War, and even then it did not do so except under conditions carefully circumscribed.

The whole history of legislation dealing with search and seizure shows how warily Congress has walked precisely because of the Fourth Amendment. A search of the entire premises for instruments of crime merely as an incident to a warrant of arrest has never been authorized by Congress. Nor has Congress ever authorized such search without a warrant even for stolen or contraband goods. On the contrary, it is precisely for the search of such goods that specific legislative authorization was given by Congress. Warrants even for such search required great particularity and could be issued only on adequate grounds. . . .

This is the historic background against which the undisputed facts of this case must be projected. For me the background is respect for that provision of the Bill of Rights which is central to enjoyment of the other guarantees of the Bill of Rights. How can there be freedom of thought or freedom of speech or freedom of religion, if the police can, without warrant, search your house and mine from garret to cellar merely because they are executing a warrant of arrest? How can men feel free if all their papers may be searched, as an incident to the arrest of someone in the house, on the chance that something may turn up, or rather, be turned up? Yesterday the justifying document was an illicit ration book, tomorrow it may be some suspect piece of literature.

The Court's reasoning, as I understand it, may be briefly stated. The entry into Harris' apartment was lawful because the agents had a warrant of arrest. The ensuing search was lawful because, as an incident of a lawful arrest, the police may search the premises on which the arrest took place since everything in the apartment was in the "possession" of the accused and subject to his control. It was lawful, therefore, for the agents to rummage the apartment in search for "instruments of the crime." Since the search was lawful, anything illicit discovered in the course of the search was lawfully seized. In any event, the seizure was lawful because the documents found were property of the United States and their possession was a continuing crime against the United States.

Much is made of the fact that the entry into the house was lawful. But we are not confined to issues of trespass. The protection of the Fourth Amendment extends to improper searches and seizures, quite apart from the legality of an entry. The Amendment asserts the "right of the people to be secure" not only "in their persons, houses," but also in their "papers, and effects, against unreasonable searches and seizures." It is also assumed that because the search was allegedly for instruments of the crime for which Harris was arrested it was *ipso facto* justified as an incident of the arrest. It would hardly be suggested that such a search could be made without warrant if Harris had been arrested on the street. How, then, is rummaging a man's closets and drawers more incidental to the arrest because the police chose to arrest him at home? For some purposes, to be sure, a man's house and its contents are deemed to be in his "possession" or "control" even when he is miles away. Because this is a mode of legal reasoning relevant to disputes over property, the usual phrase for such non-physical control is "constructive possession." But this mode of thought and these concepts are irrelevant to the application of the Fourth Amendment and hostile to respect for the liberties which it protects. Due regard for the policy of the Fourth Amendment precludes indulgence in the fiction that the recesses of a man's house are like the pockets of the clothes he wears at the time of his arrest.

To find authority for ransacking a home merely from authority for the arrest of a person is to give a novel and ominous rendering to a momentous chapter in the history of Anglo-American freedom. An Englishman's home, though a hovel, is his castle, precisely because the law secures freedom from fear of intrusion by the police

except under carefully safeguarded authorization by a magistrate. To derive from the common law right to search the person as an incident of his arrest the right of indiscriminate search of all his belongings, is to disregard the fact that the Constitution protects both unauthorized arrest and unauthorized search. Authority to arrest does not dispense with the requirement of authority to search.

But even if the search was reasonable, it does not follow that the seizure was lawful. If the agents had obtained a warrant to look for the cancelled checks, they would not be entitled to seize other items discovered in the process. *Marron v. United States*, 275 U.S. 192, 196. (\*) Harris would have been able to reclaim them by a motion to suppress evidence. Such is the policy of the Fourth Amendment, recognized by Congress and reformulated in the New Rules of Criminal Procedure adopted only last year. . . . The Court's decision achieves the novel and startling result of making the scope of search without warrant broader than an authorized search.

These principles are well established. While a few of the lower courts have uncritically and unwarrantedly extended the very limited search without warrant of a person upon his lawful arrest, such extension is hostile to the policy of the Amendment and is not warranted by the precedents of this Court.

"It is important to keep clear the distinction between prohibited searches on the one hand and improper seizures on the other. . . . Thus, it is unconstitutional to seize a person's private papers, though the search in which they were recovered was perfectly proper. . . . It is unconstitutional to make an improper search even for articles that are appropriately subject to seizure . . . And a search may be improper because of the object it seeks to uncover, . . . or because its scope extends beyond the constitutional bounds. . . .

"The course of decisions here has observed these important distinctions. The Court has not been indulgent towards inroads upon the Amendment." . . . *Davis v. United States*, 328 U.S. at 612-13 (dissenting opinion).

It is urged that even if the search was not justified, once it was made and the illicit documents discovered, they could be seized because their possession was a "continuing offense" committed "in the very presence of the agents." Apparently, then, a search undertaken illegally may retrospectively, by a legal figment, gain legality from what happened four hours later. This is to defeat the prohibi-

tion against lawless search and seizure by the application of an inverted notion of trespass *ab initio*. Here an unconstitutional trespass *ab initio* retrospectively acquires legality. Thus, the decision finds satisfaction of the constitutional requirement by circular reasoning. Search requires authority; authority to search is gained by what may be found during search without authority. By this reasoning every illegal search and seizure may be validated if the police find evidence of crime. The result can hardly be to discourage police violation of the constitutional protection.

If the search is illegal when begun, as it clearly was in this case if past decisions mean anything, it cannot retrospectively gain legality. If the search was illegal, the resulting seizure in the course of the search is illegal. It is no answer to say that possession of a document may itself be a crime. There is no suggestion here that the search was based on even a suspicion that Harris was in possession of illicit documents. The search was justified and is justified only in connection with the offense for which there was a warrant of arrest. But unless we are going to throw to the winds the latest unanimous decisions of this Court on the allowable range of search without warrant incidental to lawful arrest, *Go-Bart Co. v. United States*, 282 U.S. 344, and *United States v. Lefkowitz*, 285 U.S. 452, this was an unlawful search which rendered unavailable as evidence everything seized in the course of it. That the agents might have obtained a warrant to make the search only emphasizes the illegality of their conduct. In the words of Mr. Justice Holmes, speaking for the Court, the precious constitutional rights "against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way." *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392. Nor does the fact that the goods seized are contraband make valid an otherwise unlawful search and seizure. *Agnello v. United States*, 269 U.S. 20. Indeed it was for contraband goods that search warrants, carefully hedged about, were first authorized by Congress.

The only exceptions to the safeguard of a warrant issued by a magistrate are those which the common law recognized as inherent limitations of the policy which found expression in the Fourth Amendment—where circumstances preclude the obtaining of a warrant (as in the case of movable vehicles), and where the warrant for the arrest of a person carries with it authority to seize all

that is on the person, or is in such open and immediate physical relation to him as to be, in a fair sense, a projection of his person. That is the teaching of both the *Go-Bart* and the *Lefkowitz* cases, which effectually retract whatever may have been the loose consideration of the problem in *Marron v. United States*, 275 U.S. 192. Thus, the *Go-Bart* case emphasized that the things seized in the *Marron* case were "visible and accessible and in the offender's immediate custody." 282 U.S. 344, 358. By "immediate custody" was not meant that figurative possession which for some legal purposes puts one in "possession" of everything in a house. The sentence following that just quoted excludes precisely the kind of thing that was done here. "There was no threat of force or general search or rummaging of the place." *Ibid*.

In our case, five agents came to arrest Harris on a charge of violating the Postal Laws and the National Stolen Property Act. Though the arrest was consummated in the living room, the agents were told to make "a thorough search" of the entire apartment. In the bedroom they lifted the carpets, stripped the bed-linen, turned over the mattress. They combed the contents of the linen closet and even looked into Harris' shoes. The Selective Service cards, the items whose seizure is here in controversy, were discovered only after agents tore open a sealed envelope labeled "personal papers" which they had found under some clothes in a drawer of a small bureau in the bedroom. If there was no "rummaging of the place" in this case it would be difficult to imagine what "rummaging of the place" means.

Again, in the *Lefkowitz* case, the *Marron* case was carefully defined and limited:

"There, prohibition officers lawfully on the premises searching for liquor described in a search warrant, arrested the bartender for crime openly being committed in their presence. He was maintaining a nuisance in violation of the Act. The offense involved the element of continuity, the purchase of liquor from time to time, its sale as a regular thing for consumption upon the premises and other transactions including the keeping of accounts. The ledger and bills being in plain view were picked up by the officers as an incident of the arrest. No search for them was made." 285 U.S. at 465.



Surely no comparable situation is now here. There was no search warrant, no crime was "openly being committed" in the presence of the officers, the seized documents were not "in plain view" or "picked up by the officers as an incident of the arrest." Here a "thorough search" was made, and made without warrant.

To say that the *Go-Bart* and the *Lefkowitz* cases—both of them unanimous decisions of the Court—are authority for the conduct of the arresting agents in this case is to find that situations decisively different are the same.

It greatly underrates the quality of the American people and of the civilized standards to which they can be summoned to suggest that we must conduct our criminal justice on a lower level than does England, and that our police must be given a head which British courts deny theirs. A striking and characteristic example of the solicitous care of English courts concerning the "liberty of the subject" may be found in the recent judgments in *Christie v. Leachinsky*. In that case the House of Lords unanimously ruled that if a policeman arrests without warrant, although entertaining a reasonable suspicion of felony which would justify arrest, but does not inform the person of the nature of the charge, the police are liable for false imprisonment for such arrest. These judgments bear mightily upon the central problem of this case, namely, the appropriate balancing, in the words of Lord Simonds, of "the liberty of the subject and the convenience of the police." . . .

. . . There are those who say that we cannot have such high standards of criminal justice because the general standards of English life ensure greater obedience to law and better law enforcement. I reject this notion, and not the least because I think it is more accurate to say that the administration of criminal justice is more effective in England because law enforcement is there pursued on a more civilized level.

Of course, this may mean that it might be more difficult to obtain evidence of an offense unexpectedly uncovered in a lawless search. It may even mean that some offenses may go unwhipped of the law. If so, that is part of the cost for the greater gains of the Fourth Amendment. The whole point about the Fourth Amendment is that "Its protection extends to offenders as well as to the law abiding," because of its important bearing in maintaining a free society and avoiding the dangers of a police state. *United States v. Lefkowitz*,

supra at 464. But the impediments of the Fourth Amendment to effective law enforcement are grossly exaggerated. Disregard of procedures imposed upon the police by the Constitution and the laws is too often justified on the score of necessity. This case is a good illustration how lame an excuse it is that conduct such as is now before us is required by the exigencies of law enforcement. Here there was ample opportunity to secure the authority of law to make the search and later authority from a magistrate to seize the articles uncovered in the course of the search. . . . The hindrances that are conjured up are counsels of despair which disregard the experience of effective law enforcement in jurisdictions where the police are held to strict accountability and are forbidden conduct like that here disclosed.

Stooping to questionable methods neither enhances that respect for law which is the most potent element in law enforcement, nor, in the long run, do such methods promote successful prosecution. In this country police testimony is often rejected by juries precisely because of a widely entertained belief that illegal methods are used to secure testimony. Thus, dubious police methods defeat the very ends of justice by which such methods are justified. No such cloud rests on police testimony in England. Respect for law by law officers sets a contagious and competitive example to others. . . . Moreover, by compelling police officers to abstain from improper methods for securing evidence, pressure is exerted upon them to bring the resources of intelligence and imagination into play in the detection and prosecution of crime.

No doubt the Fourth Amendment limits the freedom of the police in bringing criminals to justice. But to allow them the freedom which the Fourth Amendment was designed to curb was deemed too costly by the Founders. . . . Of course arresting officers generally feel irked by what to them are technical legal restrictions. But they must not be allowed to be unmindful of the fact that such restrictions are essential safeguards of a free people. To sanction conduct such as this case reveals is to encourage police intrusions upon privacy, without legal warrant, in situations that go even beyond the facts of the present case. If it be said that an attempt to extend the present case may be curbed in subsequent litigation, it is important to remember that police conduct is not often subjected to judicial scrutiny. Day by day mischief may be done and prece-

dents built up in practice long before the judiciary has an opportunity to intervene. . . .

It is vital, no doubt, that criminals should be detected, and that all relevant evidence should be secured and used. On the other hand, it cannot be said too often that what is involved far transcends the fate of some sordid offender. Nothing less is involved than that which makes for an atmosphere of freedom as against a feeling of fear and repression for society as a whole. The dangers are not fanciful. We too readily forget them. . . . More than twenty years ago, before democracy was subjected to its recent stress and strain, Judge Learned Hand, in a decision approved by this Court in the *Lefkowitz* case, expressed views that seem to me decisive of this case:

"After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home. Such constitutional limitations arise from grievances, real or fancied, which their makers have suffered, and should go *pari passu* with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past. Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition." *United States v. Kirschenblatt*, 16 F. 2d 202, 203.

#### EXCLUSION FROM JURY SERVICE

*Thiel v. Southern Pacific Co.*

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328 U.S. 217, 225 (1946)

Unsuccessful in his suit against the railroad for injuries he sustained on one of its trains, Thiel attacked the jury's verdict on the ground that the panel from which it had been selected was one from which

persons who are paid by the day were intentionally and systematically excluded. Finding that the policy of the Federal District Court at San Francisco of excluding daily wage earners as a class was not justified by either federal or state law, the Supreme Court decided that the pay period of an individual is irrelevant to his eligibility or capacity to serve as juror. Said Justice Murphy, speaking for the Court: "The American tradition of trial by jury . . . necessarily contemplates an impartial jury drawn from a cross-section of the community. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. That fact lies at the very heart of the jury system. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury."

Justice Frankfurter dissented and was joined by Justice Reed. He saw no issue of discrimination; the policy was one of accommodating wage earners paid by the day. He wrote:

. . . . .

The process of justice must of course not be tainted by property prejudice any more than by racial or religious prejudice. The task of guarding against such prejudice devolves upon the district judges, who have the primary responsibility for the selection of jurors, and the circuit judges, whose review of verdicts is normally final. It is embraced in the duty, formulated by the judicial oath, to "administer justice without respect to persons, and do equal right to the poor and to the rich . . ." . . . But it is not suggested that the jury was selected so as to bring property prejudice into play in relation to this specific case or type of case, nor is there the basis for contending that the trial judge allowed the selective process to be manipulated in favor of the particular defendant. No such claim is now sustained. Neither is it claimed that the district judges for the Northern District of California, with the approval of the circuit judges, designed racial, religious, social, or economic discrimination to influence the makeup of jury panels, or that such unfair influence infused the selection of the panel, or was reflected in those who

were chosen as jurors in this case. Nor is there any suggestion that the method of selecting the jury in this case was an innovation. What is challenged is a long-standing practice adopted in order to deal with the special hardship which jury service entails for workers paid by the day. What is challenged, in short, is not a covert attempt to benefit the propertied but a practice designed, wisely or unwisely, to relieve the economically least secure from the financial burden which jury service involves under existing circumstances.

No constitutional issue is at stake. The problem is one of judicial administration. The sole question over which the Court divides is whether the established practice in the Northern District of California not to call for jury duty those otherwise qualified but dependent on a daily wage for their livelihood requires reversal of a judgment which is inherently without flaw.

Trial by jury presupposes a jury drawn from a pool broadly representative of the community as well as impartial in a specific case. Since the color of a man's skin is unrelated to his fitness as a juror, negroes cannot be excluded from jury service because they are negroes. . . . A group may be excluded for reasons that are relevant not to their fitness but to competing considerations of public interest, as is true of the exclusion of doctors, ministers, lawyers, and the like. *Rawlins v. Georgia*, 201 U.S. 638. But the broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility. . . .

Obviously these accepted general considerations must have much leeway in application. In the abstract the Court acknowledges this. "The choice of the means by which unlawful distinctions and discriminations are to be avoided rests largely in the sound discretion of the trial courts and their officers." Congress has made few inroads upon this discretion. Its chief enactment underlines the importance of avoiding rigidities in the jury system and recognizes that ample play must be allowed the joints of the machinery. The First Judiciary Act adopted for the federal courts the qualifications and exemptions, with all their diversities, prevailing in the States where the federal courts sit. . . . That has remained the law. . . . We would hardly have taken this case to consider whether the federal court in San Francisco deviated from the requirements of California

law, and nothing turns on that here. But it is not without illumination that under California law all those belonging to this long string of occupations are exempted from jury service: judicial, civil, naval, and military officers of the United States or California; local government officials; attorneys, their clerks, secretaries, and stenographers; ministers; teachers; physicians, dentists, chiropradists, optometrists, and druggists; officers, keepers, and attendants at hospitals or other charitable institutions; officers in attendance at prisons and jails; employees on boats and ships in navigable waters; express agents, mail carriers, employees of telephone and telegraph companies; keepers of ferries or tollgates; national guardsmen and firemen; superintendents, engineers, firemen, brakemen, motormen, or conductors of railroads; practitioners treating the sick by prayer.

...  
Placed in its proper framework the question now before us comes to this: Have the district judges for the Northern District of California, supported by the circuit judges of the Ninth Circuit, abused their discretion in sanctioning a practice of not calling for jury duty those who are dependent upon a daily wage for their livelihood?

The precise issue must be freed from all atmospheric innuendoes. Not to do so is unfair to the administration of justice, which should be the touchstone for the disposition of the judgment under challenge, and no less unfair to a group of judges of long experience and tested fidelity. If workmen were systematically not drawn for the jury, the practice would be indefensible. But concern over discrimination against wage earners must be put out of the reckoning. Concededly those who are paid weekly or monthly wages were placed on the jury lists. And that no line was drawn against the wage earners because they were wage earners, and that there was merely anticipatory excuse of daily wage earners, is conclusively established by the fact that the wives of such daily wage earners were included in the jury lists. As to any claim of the operation of a designed economic bias in the method of selecting the juries, the Circuit Court of Appeals rightly found "no evidence that the persons whose names were in the box, or the persons whose names were drawn therefrom and who thus became members of the panel, were 'mostly business executives or those having the employer's viewpoint.'" ...

"When the question is narrowed to its proper form the answer does not need much discussion. The nature of the classes excluded was not such as was likely to affect the conduct of the members as

jurymen, or to make them act otherwise than those who were drawn would act. The exclusion was not the result of race or class prejudice. It does not even appear that any of the defendants belonged to any of the excluded classes. The ground of omission no doubt was that pointed out by the state court, that the business of the persons omitted was such that either they would have been entitled to claim exemption or that probably they would have been excused." So this Court speaking through Mr. Justice Holmes answered a related question in *Rawlins v. Georgia*, 201 U.S. 638, 640. And the justification for the answer applies to the present situation.

It is difficult to believe that this judgment would have been reversed if the trial judge had excused, one by one, all those wage earners whom the jury commissioner, acting on the practice of trial judges of San Francisco, excluded. For it will hardly be contended that the absence of such daily wage earners from the jury panel removed a group who would act otherwise than workers paid by the week or the wives of the daily wage earners themselves. The exclusion of the daily wage earners does not remove a group who would, in the language of Mr. Justice Holmes, "act otherwise than those who are drawn would act." Judged by the trend of census statistics, laborers paid by the day are not a predominant portion of the workers of the country. . . . It certainly is too large an assumption on which to base judicial action that those workers who are paid by the day have a different outlook psychologically and economically than those who earn weekly wages. In the language of Mr. Chief Justice Hughes, "Impartiality is not a technical conception. It is a state of mind." *United States v. Wood*, 299 U.S. 123, 145. And American society is happily not so fragmentized that those who get paid by the day adopt a different social outlook, have a different sense of justice, and a different conception of a juror's responsibility than their fellow workers paid by the week. No doubt the insecurities of a system of daily earnings, or generally of wages on less than an annual basis, raise serious problems as does, of course, also the question of guaranteed wage plans. . . . But these are matters quite irrelevant to the problem confronting district judges in dealing with the present plight of daily wage earners when called to serve as jurors and the power of the judges, as a matter of discretion, to excuse such daily wage earners from duty.

For it cannot be denied that jury service by persons dependent upon a daily wage imposes a very real burden. Judge John C. Knox,

Senior District Judge of the Southern District of New York, thus described the problem:

" . . . when jurors' compensation is limited to \$4 per day, and when their periods of service are often protracted, thousands upon thousands of persons simply cannot afford to serve. To require them to do so is nothing less than the imposition upon them of extreme hardship.

"With respect to the item last-mentioned, it is easy to say that jury duty should be regarded as a patriotic service, and that all public-spirited persons should willingly sacrifice pecuniary rewards in the performance of an obligation of citizenship. With that statement I am in full accord, but it does not solve the difficulty. Adequate provision for one's family is the first consideration of most men. And if, with this thought predominant in a man's mind, he is required to perform a public service that means a default of an insurance premium, the sacrifice of a suit of clothes, or the loss of this [his] job, he will entertain feelings of resentment that will be anything but conducive to the rendition of justice. In other words, persons with a grievance against the Government or who serve under conditions that expose them to self-denial are not likely to have the spiritual contentment and mental detachment that good jurors require." . . .

No doubt, in view of the changes in the composition and distribution of our population and the growth of metropolitan areas, a re-examination is due of the operation of the jury system in the federal courts. Just as the federal judicial system has been reorganized and administratively modified through a series of recent enactments . . . the jury system, that indispensable adjunct of the federal courts, calls for review to meet modern conditions. The object is to devise a system that is fairly representative of our variegated population, exacts the obligation of citizenship to share in the administration of justice without operating too harshly upon any section of the community, and is duly regardful of the public interest in matters outside the jury system. This means that the many factors entering into the manner of selection, with appropriate qualifications and exemptions, the length of service and the basis of compensation must be properly balanced. These are essentially problems in administration calling for appropriate standards flexibly adjusted.



Wise answers preclude treatment by rigid legislation or rigid administration. Congress has devised the appropriate procedure and instrument for making these difficult and delicate adjustments by its creation, in 1922, of the Conference of Senior Circuit Judges. The Conference, under the presidency of the Chief Justice of the United States, is charged with the duty of continuous oversight of the actual workings of the federal judicial system and of meeting disclosed needs, either through practices formulated by the Conference, or, when legislation is necessary or more appropriate, through proposals submitted to Congress. . . . That is precisely the course that has been followed in regard to the inadequacies in the operation of the federal jury system. . . .

The Court now deals by adjudication with one phase of an organic problem and does so by nullifying a judgment which, on the record, was wholly unaffected by difficulties inherent in a situation that calls for comprehensive treatment, both legislative and administrative. If it be suggested that until there is legislation this decision will be the means of encouraging the district judges to uncover a better answer than they have thus far given to a lively problem, an appropriate admonition from the Court would accomplish the same result, or common action regarding the practice now under review may be secured from the Conference of Senior Circuit Judges. To reverse a judgment free from intrinsic infirmity and perhaps to put in question other judgments based on verdicts that resulted from the same method of selecting juries, reminds too much of burning the barn in order to roast the pig.

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## THE BILL OF RIGHTS AND THE FOURTEENTH AMENDMENT

### *Adamson v. California*

332 U.S. 46, 59 (1947)

Adamson appealed his conviction for murder in a California court with the claim that the provisions of the state constitution and statutes permitting the prosecution to comment on the failure of the accused to testify in his own behalf violated the self-incrimination clause of the

Fifth Amendment, incorporated by implication into the Fourteenth. This contention gave the Justices another opportunity to debate the issue as to the extent to which the federal Bill of Rights is to be included in the due process clause of the Fourteenth Amendment. Chief Justice Vinson and Justices Reed, Frankfurter, Jackson, and Burton rejected Adamson's claim, Mr. Justice Reed writing the opinion for the Court. The majority held that since the privilege against self-incrimination is not "inherent" in the right to a fair trial, the guarantee of the Fifth Amendment that no person "shall be compelled in any criminal case to be a witness against himself" does not apply to the states under the Fourteenth Amendment.

Justice Frankfurter wrote a concurring opinion in which he discussed what is probably the most significant development in the twentieth century so far as the judicial protection of private rights is concerned. This is the process by which the Supreme Court of the United States has been gradually enlarging the meaning of "liberty" guaranteed by the due process clause of the Fourteenth Amendment, by incorporating into it certain rights and procedures deemed to be essential to liberty and justice. The justification for the absorption into the Fourteenth Amendment of such rights as the freedoms of the First Amendment or such safeguards as assistance by counsel is not that they are to be found in the federal Bill of Rights. Mr. Justice Frankfurter sought to demonstrate that the true rationale for this extension of due process is that there are certain rights and procedures which are so "fundamental" that the states may not violate them without denying the very "liberty" assured by the Fourteenth Amendment. He stoutly maintained that due process in the Fourteenth Amendment does not cover all of the rights enumerated in the Bill of Rights, and that rather than depend on "subjective selection" the Court must determine whether "the whole course of the proceedings . . . offend those canons of decency and fairness which express the notions of justice of English-speaking peoples."

For the minority, which included Justices Douglas, Murphy, and Rutledge, Mr. Justice Black insisted that "one of the chief objects" which the provisions of the first section of the Fourteenth Amendment "were intended to accomplish was to make the Bill of Rights applicable to the states." He buttressed this thesis with an elaborate historical appendix.

Mr. Justice Frankfurter's concurring opinion read in part:

Less than ten years ago, Mr. Justice Cardozo announced as settled constitutional law that while the Fifth Amendment, "which is not directed to the states, but solely to the federal government," provides that no person shall be compelled in any criminal case to be a witness against himself, the process of law assured by the

Fourteenth Amendment does not require such immunity from self-crimination: "in prosecutions by a state, the exemption will fail if the state elects to end it." *Palko v. Connecticut*, 302 U.S. 319, 322, 324. Mr. Justice Cardozo spoke for the Court, consisting of Mr. Chief Justice Hughes, and McReynolds, Brandeis, Sutherland, Stone, Roberts, Black, JJ. (Mr. Justice Butler dissented.) The matter no longer called for discussion; a reference to *Twining v. New Jersey*, 211 U.S. 78, decided thirty years before the *Palko* case, sufficed.

Decisions of this Court do not have equal intrinsic authority. The *Twining* case shows the judicial process at its best—comprehensive briefs and powerful arguments on both sides, followed by long deliberation, resulting in an opinion by Mr. Justice Moody which at once gained and has ever since retained recognition as one of the outstanding opinions in the history of the Court. After enjoying unquestioned prestige for forty years, the *Twining* case should not be diluted, even unwittingly, either in its judicial philosophy or in its particulars. As the surest way of keeping the *Twining* case intact, I would affirm this case on its authority.

The circumstances of this case present a minor variant from what was before the Court in *Twining v. New Jersey*, supra. . . . The matter lies within a very narrow compass. The point is made that a defendant who has a vulnerable record would, by taking the stand, subject himself to having his credibility impeached thereby. . . . Accordingly, under California law, he is confronted with the dilemma, whether to testify and perchance have his bad record prejudice him in the minds of the jury, or to subject himself to the unfavorable inference which the jury might draw from his silence. And so, it is argued, if he chooses the latter alternative, the jury ought not to be allowed to attribute his silence to a consciousness of guilt when it might be due merely to a desire to escape damaging cross-examination.

This does not create an issue different from that settled in the *Twining* case. Only a technical rule of law would exclude from consideration that which is relevant, as a matter of fair reasoning, to the solution of a problem. Sensible and just-minded men, in important affairs of life, deem it significant that a man remains silent when confronted with serious and responsible evidence against himself which it is within his power to contradict. The notion that to allow jurors to do that which sensible and right-minded men do

every day violates the "immutable principles of justice" as conceived by a civilized society is to trivialize the importance of "due process." Nor does it make any difference in drawing significance from silence under such circumstances that an accused may deem it more advantageous to remain silent than to speak, on the nice calculation that by taking the witness stand he may expose himself to having his credibility impugned by reason of his criminal record. Silence under such circumstances is still significant. A person in that situation may express to the jury, through appropriate requests to charge, why he prefers to keep silent. A man who has done one wrong may prove his innocence on a totally different charge. To deny that the jury can be trusted to make such discrimination is to show little confidence in the jury system. The prosecution is frequently compelled to rely on the testimony of shady characters whose credibility is bound to be the chief target of the defense. It is a common practice in criminal trials to draw out of a vulnerable witness' mouth his vulnerability, and then convince the jury that nevertheless he is telling the truth in this particular case. This is also a common experience for defendants.

For historical reasons a limited immunity from the common duty to testify was written into the Federal Bill of Rights, and I am prepared to agree that, as part of that immunity, comment on the failure of an accused to take the witness stand is forbidden in federal prosecutions. It is so, of course, by explicit act of Congress. . . . But to suggest that such a limitation can be drawn out of "due process" in its protection of ultimate decency in a civilized society is to suggest that the Due Process Clause fastened fetters of unreason upon the States. . . .

Between the incorporation of the Fourteenth Amendment into the Constitution and the beginning of the present membership of the Court—a period of seventy years—the scope of that Amendment was passed upon by forty-three judges. Of all these judges, only one, who may respectfully be called an eccentric exception, ever indicated the belief that the Fourteenth Amendment was a shorthand summary of the first eight Amendments theretofore limiting only the Federal Government, and that due process incorporated those eight Amendments as restrictions upon the powers of the States. Among these judges were not only those who would have to be included among the greatest in the history of the Court, but—it is especially

relevant to note—they included those whose services in the cause of human rights and the spirit of freedom are the most conspicuous in our history. It is not invidious to single out Miller, Davis, Bradley, Waite, Matthews, Gray, Fuller, Holmes, Brandeis, Stone and Cardozo (to speak only of the dead) as judges who were alert in safeguarding and promoting the interests of liberty and human dignity through law. But they were also judges mindful of the relation of our federal system to a progressively democratic society and therefore duly regardful of the scope of authority that was left to the States even after the Civil War. And so they did not find that the Fourteenth Amendment, concerned as it was with matters fundamental to the pursuit of justice, fastened upon the States procedural arrangements which, in the language of Mr. Justice Cardozo, only those who are “narrow or provincial” would deem essential to “a fair and enlightened system of justice.” . . . To suggest that it is inconsistent with a truly free society to begin prosecutions without an indictment, to try petty civil cases without the paraphernalia of a common law jury, to take into consideration that one who has full opportunity to make a defense remains silent is, in de Tocqueville’s phrase, to confound the familiar with the necessary.

The short answer to the suggestion that the provision of the Fourteenth Amendment, which ordains “nor shall any State deprive any person of life, liberty, or property, without due process of law,” was a way of saying that every State must thereafter initiate prosecutions through indictments by a grand jury, must have a trial by a jury of twelve in criminal cases, and must have trial by such a jury in common law suits where the amount in controversy exceeds twenty dollars, is that it is a strange way of saying it. It would be extraordinarily strange for a Constitution to convey such specific commands in such a roundabout and inexplicit way. After all, an amendment to the Constitution should be read in a “sense most obvious to the common understanding at the time of its adoption.” . . . For it was for public adoption that it was proposed.” See Mr. Justice Holmes in *Eisner v. Macomber*, 252 U.S. 189, 220. Those reading the English language with the meaning which it ordinarily conveys, those conversant with the political and legal history of the concept of due process, those sensitive to the relation of the States to the central government as well as the relation of some of the provisions of the Bill of Rights to the process of justice, would hardly

recognize the Fourteenth Amendment as a cover for the various explicit provisions of the first eight Amendments. Some of these are enduring reflections of experience with human nature, while some express the restricted views of Eighteenth-Century England regarding the best methods for the ascertainment of facts. The notion that the Fourteenth Amendment was a covert way of imposing upon the States all the rules which it seemed important to Eighteenth-Century statesmen to write into the Federal Amendments, was rejected by judges who were themselves witnesses of the process by which the Fourteenth Amendment became part of the Constitution. Arguments that may now be adduced to prove that the first eight Amendments were concealed within the historic phrasing(\*) of the Fourteenth Amendment were not unknown at the time of its adoption. A surer estimate of their bearing was possible for judges at the time than distorting distance is likely to vouchsafe. Any evidence of design or purpose not contemporaneously known could hardly have influenced those who ratified the Amendment. Remarks of a particular proponent of the Amendment, no matter how influential, are not to be deemed part of the Amendment. What was submitted for ratification was his proposal, not his speech. Thus, at the time of the ratification of the Fourteenth Amendment the constitutions of nearly half of the ratifying States did not have the rigorous requirements of the Fifth Amendment for instituting criminal proceedings through a grand jury. It could hardly have occurred to these States that by ratifying the Amendment they uprooted their established methods for prosecuting crime and fastened upon themselves a new prosecutorial system.

Indeed, the suggestion that the Fourteenth Amendment incorporates the first eight Amendments as such is not unambiguously urged. Even the boldest innovator would shrink from suggesting to more than half the States that they may no longer initiate prosecutions without indictment by grand jury, or that thereafter all the States of the Union must furnish a jury of twelve for every case involving a claim above twenty dollars. There is suggested merely a selective incorporation of the first eight Amendments into the Fourteenth Amendment. Some are in and some are out, but we are left in the dark as to which are in and which are out. Nor are we given the calculus for determining which go in and which stay out. If the basis of selection is merely that those provisions of the first

eight Amendments are incorporated which commend themselves to individual justices as indispensable to the dignity and happiness of a free man, we are thrown back to a merely subjective test. The protection against unreasonable search and seizure might have primacy for one judge, while trial by a jury of twelve for every claim above twenty dollars might appear to another as an ultimate need in a free society. In the history of thought "natural law" has a much longer and much better founded meaning and justification than such subjective selection of the first eight Amendments for incorporation into the Fourteenth. If all that is meant is that due process contains within itself certain minimal standards which are "of the very essence of a scheme of ordered liberty," . . . putting upon this Court the duty of applying these standards from time to time, then we have merely arrived at the insight which our predecessors long ago expressed. We are called upon to apply to the difficult issues of our own day the wisdom afforded by the great opinions in this field. . . . This guidance bids us to be duly mindful of the heritage of the past, with its great lessons of how liberties are won and how they are lost. As judges charged with the delicate task of subjecting the government of a continent to the Rule of Law we must be particularly mindful that it is "a constitution we are expounding," so that it should not be imprisoned in what are merely legal forms even though they have the sanction of the Eighteenth Century.

It may not be amiss to restate the pervasive function of the Fourteenth Amendment in exacting from the States observance of basic liberties. . . . The Amendment neither comprehends the specific provisions by which the founders deemed it appropriate to restrict the federal government nor is it confined to them. The Due Process Clause of the Fourteenth Amendment has an independent potency, precisely as does the Due Process Clause of the Fifth Amendment in relation to the Federal Government. It ought not to require argument to reject the notion that due process of law meant one thing in the Fifth Amendment and another in the Fourteenth. The Fifth Amendment specifically prohibits prosecution of an "infamous crime" except upon indictment; it forbids double jeopardy; it bars compelling a person to be a witness against himself in any criminal case; it precludes deprivation of "life, liberty, or property, without due process of law. . . ." Are Madison and his contemporaries in the framing of the Bill of Rights to be charged with

writing into it a meaningless clause? To consider "due process of law" as merely a shorthand statement of other specific clauses in the same amendment is to attribute to the authors and proponents of this Amendment ignorance of, or indifference to, a historic conception which was one of the great instruments in the arsenal of constitutional freedom which the Bill of Rights was to protect and strengthen.

A construction which gives to due process no independent function but turns it into a summary of the specific provisions of the Bill of Rights would, as has been noted, tear up by the roots much of the fabric of law in the several States, and would deprive the States of opportunity for reforms in legal process designed for extending the area of freedom. It would assume that no other abuses would reveal themselves in the course of time than those which had become manifest in 1791. Such a view not only disregards the historic meaning of "due process." It leads inevitably to a warped construction of specific provisions of the Bill of Rights to bring within their scope conduct clearly condemned by due process but not easily fitting into the pigeon-holes of the specific provisions. It seems pretty late in the day to suggest that a phrase so laden with historic meaning should be given an improvised content consisting of some but not all of the provisions of the first eight Amendments, selected on an undefined basis, with improvisation of content for the provisions so selected.

And so, when, as in a case like the present, a conviction in a State court is here for review under a claim that a right protected by the Due Process Clause of the Fourteenth Amendment has been denied, the issue is not whether an infraction of one of the specific provisions of the first eight Amendments is disclosed by the record. The relevant question is whether the criminal proceedings which resulted in conviction deprived the accused of the due process of law to which the United States Constitution entitled him. Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses. These standards of justice are not authoritatively formulated anywhere as though they were prescriptions



in a pharmacopoeia. But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial judgment in applying the Due Process Clause must move within the limits of accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment. The fact that judges among themselves may differ whether in a particular case a trial offends accepted notions of justice is not disproof that general rather than idiosyncratic standards are applied. An important safeguard against such merely individual judgment is an alert deference to the judgment of the State court under review.

POLICE METHODS "IN CONFLICT WITH DEEPLY ROOTED  
FEELINGS OF THE COMMUNITY"

*Haley v. Ohio*

332 U.S. 596, 601 (1948)

In this case Justice Frankfurter cast the deciding vote to help form the necessary majority for reversing a conviction in a state court because of the methods used by the police in securing the confession on which it was based. His opinion explaining why he did so illustrates dramatically the extent to which it continues to be true that whether a conviction will be upset depends on the way the Justices see the circumstances in the particular case.

Arrested on Friday evening for the murder of a storekeeper, Haley, a fifteen-year-old Negro, was questioned for five hours during the night, without counsel or family being present, and was not brought before a magistrate until Tuesday. His mother was not allowed to see him until Thursday. Said Justice Douglas for the Court: "A 15-year-old lad, questioned through the dead of night by relays of police, is a ready victim of the inquisition. Mature men possibly might stand the ordeal from midnight to 5 A.M. But we cannot believe that a lad of tender years is a match for the police in such a contest. He needs counsel and support if he is not to become the victim first of fear, then of panic. He needs someone on whom to lean lest the overpowering presence of the law, as he knows it, crush him. No friend stood at the side of this 15-year-old boy as the police, working in relays, questioned him hour after hour, from midnight until dawn. No lawyer stood guard to make sure that the police went so far and no farther, to see to it that they stopped

short of the point where he became the victim of coercion." Chief Justice Vinson and Justices Reed, Jackson, and Burton dissented.

Mr. Justice Frankfurter's concurring opinion said in part:

In a recent series of cases, beginning with *Brown v. Mississippi*, 297 U.S. 278, the Court has set aside convictions coming here from State courts because they were based on confessions admitted under circumstances that offended the requirements of the "due process" exacted from the States by the Fourteenth Amendment. If the rationale of those cases ruled this, we would dispose of it *per curiam* with the mere citation of the cases. They do not rule it. Since at best this Court's reversal of a State court's conviction for want of due process always involves a delicate exercise of power and since there is sharp division as to the propriety of its exercise in this case, I deem it appropriate to state as explicitly as possible why, although I have doubts and difficulties, I cannot support affirmance of the conviction.

The doubts and difficulties derive from the very nature of the problem before us. They arise frequently when this Court is obliged to give definiteness to "the vague contours" of Due Process or, to change the figure, to spin judgment upon State action out of that gossamer concept. Subtle and even elusive as its criteria are, we cannot escape that duty of judicial review. The nature of the duty, however, makes it especially important to be humble in exercising it. Humility in this context means an alert self-scrutiny so as to avoid infusing into the vagueness of a Constitutional command one's merely private notions. Like other mortals, judges, though unaware, may be in the grip of prepossessions. The only way to relax such a grip, the only way to avoid finding in the Constitution the personal bias one has placed in it, is to explore the influences that have shaped one's unanalyzed views in order to lay bare prepossessions.

A lifetime's preoccupation with criminal justice, as prosecutor, defender of civil liberties and scientific student, naturally leaves one with views. Thus, I disbelieve in capital punishment. But as a judge I could not impose the views of the very few States who through bitter experience have abolished capital punishment upon all the other States, by finding that "due process" proscribes it. Again, I do not believe that even capital offenses by boys of fifteen should be

dealt with according to the conventional criminal procedure. It would, however, be bald judicial usurpation to hold that States violate the Constitution in subjecting minors like Haley to such a procedure. If a State, consistently with the Fourteenth Amendment, may try a boy of fifteen charged with murder by the ordinary criminal procedure, I cannot say that such a youth is never capable of that free choice of action which, in the eyes of the law, makes a confession "voluntary."

But whether a confession of a lad of fifteen is "voluntary" and as such admissible, or "coerced" and thus wanting in due process, is not a matter of mathematical determination. Essentially it invites psychological judgment—a psychological judgment that reflects deep, even if inarticulate, feelings of our society. Judges must divine that feeling as best they can from all the relevant evidence and light which they can bring to bear for a confident judgment of such an issue, and with every endeavor to detach themselves from their merely private views. . . .

While the issue thus formulated appears vague and impalpable, it cannot be too often repeated that the limitations which the Due Process Clause of the Fourteenth Amendment placed upon the methods by which the States may prosecute for crime cannot be more narrowly conceived. This Court must give the freest possible scope to States in the choice of their methods of criminal procedure. But these procedures cannot include methods that may fairly be deemed to be in conflict with deeply rooted feelings of the community. . . . Of course this is a most difficult test to apply, but apply it we must, warily, and from case to case.

This brings me to the precise issue on the record before us. Suspecting a fifteen-year-old boy of complicity in murder resulting from attempted robbery, at about midnight the police took him from his home to police headquarters. There he was questioned for about five hours by at least five police officers who interrogated in relays of two or more. About five o'clock in the morning this procedure culminated in what the police regarded as a confession, whereupon it was formally reduced to writing. During the course of the interrogation the boy was not advised that he was not obliged to talk, that it was his right if he chose to say not a word, nor that he was entitled to have the benefit of counsel or the help of his

family. Bearing upon the safeguards of these rights, the Chief of Police admitted that while he knew that the boy "had a right to remain mute and not answer any questions" he did not know that it was the duty of the police to apprise him of that fact. Unquestionably, during this whole period he was held incommunicado. Only after the nightlong questioning had resulted in disclosures satisfactory to the police and as such to be documented, was there read to the boy a clause giving the conventional formula about his constitutional right to make or withhold a statement and stating that if he makes it, he makes it of his "own free will." Do these uncontested facts justify a State court in finding that the boy's confession was "voluntary," or do the circumstances by their very nature preclude a finding that a deliberate and responsible choice was exercised by the boy in the confession that came at the end of five hours questioning?

The answer, as has already been intimated, depends on an evaluation of psychological factors, or, more accurately stated, upon the pervasive feeling of society regarding such psychological factors. Unfortunately, we cannot draw upon any formulated expression of the existence of such feeling. Nor are there available experts on such matters to guide the judicial judgment. Our Constitutional system makes it the Court's duty to interpret those feelings of society to which the Due Process Clause gives legal protection. Because of their inherent vagueness the tests by which we are to be guided are most unsatisfactory, but such as they are we must apply them.

The Ohio courts have in effect denied that the very nature of the circumstances of the boy's confession precludes a finding that it was voluntary. Their denial carries great weight, of course. It requires much to be overborne. But it does not end the matter. Against it we have the judgment that comes from judicial experience with the conduct of criminal trials as they pass in review before this Court. An impressive series of cases in this and other courts admonishes of the temptations to abuse of police endeavors to secure confessions from suspects, through protracted questioning, carried on in secrecy, with the inevitable disquietude and fears police interrogations naturally engender in individuals questioned while held incommunicado, without the aid of counsel and unprotected by the safeguards of a judicial inquiry. Disinterested zeal for the public

good does not assure either wisdom or right in the methods it pursues. A report of President Hoover's National Commission on Law Observance and Enforcement gave proof of the fact, unfortunately, that these potentialities of abuse were not the imaginings of mawkish sentimentality, nor their tolerance desirable or necessary for a stern policy against crime. Legislation throughout the country reflects a similar belief that detention for purposes of eliciting confessions through secret, persistent, long-continued interrogation violates sentiments deeply embedded in the feelings of our people. . . .

It is suggested that Haley's guilt could easily have been established without the confession elicited by the sweating process of the night's secret interrogation. But this only affords one more proof that in guarding against misuse of the law enforcement process the effective detection of crime and the prosecution of criminals are furthered and not hampered. Such constitutional restraints of decency derive from reliance upon the resources of intelligence in dealing with crime and discourage the too easy temptations of unimaginative crude force, even when such force is not brutally employed. . . .

It would disregard standards that we cherish as part of our faith in the strength and well-being of a rational, civilized society to hold that a confession is "voluntary" simply because the confession is the product of a sentient choice. "Conduct under duress involves a choice," . . . and conduct devoid of physical pressure but not leaving a free exercise of choice is the product of duress as much so as choice reflecting physical constraint.

Unhappily we have neither physical nor intellectual weights and measures by which judicial judgment can determine when pressures in securing a confession reach the coercive intensity that calls for the exclusion of a statement so secured. Of course, the police meant to exercise pressures upon Haley to make him talk. That was the very purpose of their procedure. In concluding that the pressures that were exerted in this case to make a lad of fifteen talk when the Constitution gives him the right to keep silent, and when the situation was so contrived that appreciation of his rights and thereby the means of asserting them were effectively withheld from him by the police, I do not believe I express a merely personal bias against such a procedure. Such a finding, I believe, reflects those fundamental notions of fairness and justice in the determination of guilt or

innocence which lie embedded in the feelings of the American people and are enshrined in the Due Process Clause of the Fourteenth Amendment. To remove the inducement to resort to such methods this Court has repeatedly denied use of the fruits of illicit methods.

Accordingly, I think Haley's confession should have been excluded and the conviction based upon it should not stand.

## BUREAUCRACY AND JUDICIAL CONTROL

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### "COLLABORATIVE INSTRUMENTALITIES OF JUSTICE"

*United States v. Morgan*

313 U.S. 409 (1941)

Mr. Frankfurter once defined administrative law by saying that it "deals with the field of legal control exercised by law-administering agencies other than courts, and the field of control exercised by courts over such agencies." The article containing this statement, written in 1927, made it quite clear that while he viewed the administrative process with the sympathetic outlook of one who appreciated the social need for it, he was aware that the exercise of discretion "opened the door to its potential abuse, arbitrariness." This dual approach toward the work of administrative agencies has also been manifested in his utterances on the subject since coming to the Court; and it was to be expected, of course, that the former professor of administrative law would have much to say, as a judge, concerning the administrative arm of government.

One of Mr. Frankfurter's favorite themes was the need for bar and bench to view with more friendly eyes the activities of regulatory tribunals. More than once he pointed to interminable litigation in the administration of public policy as one of the fruits of a hostile judicial attitude. It was, therefore, quite fitting that he should have been designated to write the opinion in a case winding up a controversy that was before the courts for eleven years. The history of the problem is detailed in his opinion printed below, in the course of which he repeated the admonition that, "although the administrative process has

had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other." His opinion read in part:

This case originated eleven years ago. As a result of proceedings begun in April, 1930, under the Packers and Stockyards Act, . . . the Secretary of Agriculture in June, 1933, issued an order setting maximum rates to be charged by market agencies for their services at the Kansas City Stockyards. The market agencies brought suit to set aside his order. The district court issued a temporary restraining order, under which amounts charged in excess of the rates fixed by the order were impounded, and later it upheld the order. . . . On appeal here, . . . the case was sent back to the district court in order to determine on the issues raised by the pleadings whether the agencies had been denied the "full hearing" demanded by §310 of the Act. 298 U.S. 468. The district court thereupon decided that this requirement of the statute had been satisfied. . . . The case was again brought here and the order of the Secretary was held invalid because of procedural defects. 304 U.S. 1. Prior to this decision, the Secretary and the market agencies had agreed upon a higher schedule of rates to become effective on December 1, 1937. However, under the impounding order, which had continued in effect until that date, over half a million dollars had been deposited. The disposition of this fund was made a ground for a petition for rehearing after the second Morgan decision, but the petition was denied because that question was for the district court. 304 U.S. 23, 26. The Secretary then reopened the original proceedings to determine reasonable rates during the impounding period. Before the Secretary had made a new order, the district court directed that the impounded moneys be turned over to the market agencies. . . . The case came here for the third time, and we reversed the district court and required its retention of the fund "until such time as the Secretary, proceeding with due expedition, shall have entered a final order in the proceedings before him." 307 U.S. 183, 198. This decision was rendered on May 15, 1939. A month later, the Secretary issued a new schedule of rates for the impounding period based on elaborate findings. Accordingly, the Government moved the district court to distribute the funds in accordance with the Secretary's order, but that court, with one of its three judges dissenting, held



the order invalid and directed that the funds be given to the market agencies. . . . The case is now here for the fourth time.

The validity of the Secretary's order has undergone the closest scrutiny in elaborate briefs and extended oral arguments. Nothing has been overlooked. However, in the final stage of this long drawn out litigation, critical examination reveals only a few issues demanding attention.

When the matter was last here we defined the duty of the Secretary. He was to determine reasonable rates for the impounding period so that there could be just distribution of the funds which the court below had taken into its registry. The nature of the problem before the Secretary was a guide to its solution. The Secretary's task was not the usual enterprise of fixing rates for the future, so largely an exercise in prophecy. Unique circumstances made him, in 1939, the arbiter of rates for a period between 1933 and 1937. But even such a retrospective determination does not present a mathematical problem. Doubts and difficulties incapable of exact resolution confront judgment. More than that, since the Secretary is the guardian of the public interest in regulating a business of public concern it is not for him merely to reflect the items on a profit and loss statement. He must consider whether these represent services which properly should be charged to the public. While, therefore, the Secretary in determining rates for the past could not deny himself the benefit of hindsight, he was not merely a bookkeeper posting items into a ledger. Rates to which these public agencies were entitled were not to be derived merely from their expenditures and actual income.

This Court defined the duty of the Secretary in its decision in the 307th U.S. The record leaves no doubt that the Secretary, when he filed his order a month after that decision, appropriately discharged the duty. He served upon the market agencies the order of June 14, 1933, and the findings underlying it as the starting point of the inquiry. The market agencies . . . alleged that conditions had changed much since 1933, and asked for the appointment of an examiner to take new evidence. Because he deemed the earlier findings illuminating and helpful "as a working basis for this hearing," the Secretary refused to withdraw them. But he appointed an examiner to hear new evidence and denied "any intention of depriving the respondents of the opportunity of offering evidence concerning conditions affecting the reasonableness of their rates during

the period subsequent to June 14, 1933." He further stated that the "forecasts of conditions" in the 1933 order "can now be checked in light of subsequent events." . . . The Secretary thus adopted a procedure which admitted whatever light was shed by change of circumstances after 1933. The market agencies freely availed themselves of this procedure; and the Secretary's findings leave no room for doubt that his conclusions represent a judgment of 1939 and not a prophecy of 1933. Having overruled the contention of Government counsel that evidence of conditions after 1933 was irrelevant, he took note of the fact that fewer livestock came to the market after 1933; that a larger number came by truck, thereby causing a decrease in the number of animals in an average consignment; that specific as well as general economic factors touching the market at Kansas City had changed; that statistics relevant in 1933 had become outmoded; and that he had before him evidence of expenses for "business getting and maintaining" and salesmanship not before him in 1933. The Secretary thus unequivocally avowed his intention to consider conditions after 1933 and his findings carry out his purpose.(\*). We must therefore reject the claim that the Secretary's judgment was founded on the misconception that he must shut his mind to everything that happened after 1933 and in 1939 fix rates in the imaginary world of 1933.

Another attack upon the Secretary's order is the conventional objection that the findings were not rooted in proof. To reexamine here with particularity the extensive findings made by the Secretary, and to test them by a record of 1340 printed pages and thousands of pages of additional exhibits, would in itself go a long way to convert a contest before the Secretary into one before the courts. . . . We have canvassed too fully in the past the duties respectively allotted to the Secretary of Agriculture and the courts in the enforcement of the Packers and Stockyards Act to justify extended discussion of the governing principles. . . . We are in the legislative realm of fixing rates. This is a task of striking a balance and reaching a judgment on factors beset with doubts and difficulties, uncertainty and speculation. On ultimate analysis the real question is whether the Secretary or a court should make an appraisal of elements having delusive certainty. Congress has put the responsibility on the Secretary and the Constitution does not deny the assignment.

The objection that the proof does not support the findings is really a repetition in disguise of the unfounded claim that the Secretary misconceived his duty and made his order in 1939 as though he were acting in 1933. The bedrock of these variously phrased attacks upon the order is the contention that the Secretary was indifferent to events occurring after 1933. The short answer is that he was not. The conclusion which he drew from these events is another matter. (\*)

Specifically, it is urged that by the increase of rates for the future, to which the market agencies and the Secretary agreed in 1937, changes in circumstances were recognized, while the present order ignored these changes because its rates are at the same level as the original order. But the Secretary did not disregard changed market conditions during the impounding period. Evidence showing these changes was submitted by the market agencies. (\*) He was thus duly apprised of the changes and they entered into the findings. To be sure, in ascertaining the reasonable rates for the impounding period he did not attach to them the significance which the market agencies drew from them. As a result of an elaborate study of conditions prior to 1933 and evidence indicating no essential change in those conditions for the purpose at hand during the later years, the Secretary concluded that the market was overstaffed and that in the competitive setting of the business amounts had been spent not justified by that public interest which he is charged to protect. Actual expenses for salesmen's salaries and "business getting," the items chiefly in controversy, he found, did not furnish an adequate guide to the ascertainment of reasonable rates. Had the lower rates originally set by the Secretary in 1933 been tested by experience, audits of the market agencies under these rates would have reflected the practical operation of the policy of lowering costs under controlled conditions. But this source of experience was unavailable because the agencies throughout the impounding period continued to operate under the higher rates. Quite different considerations may properly have influenced the Secretary in fixing rates for the impounding period from those by which he determined a schedule of rates for the future. The existence of the differences is recognized in the agreement between the Secretary and the market agencies whereby the higher rates of the 1937 schedule were to be "without prejudice" either to the Government or to the agencies in the pres-

ent litigation. It was further agreed in 1937 that after six months, and unless the rate order of 1939 was found invalid, the Secretary could at any time "without further hearing" reduce the rates for the future to the 1933 level. There were very great complexities in determining rates for an industry affected by the unstable conditions which surrounded the Kansas City market in 1937. And the expert tribunal charged with the task may well have felt a need for flexibility in the prophecy involved in setting future rates which did not enter the judgment required in fixing rates for a past period. It is not for us to try to penetrate the precise course of the Secretary's reasoning. Our duty is at an end when we find, as we do find, that the Secretary was responsibly conscious of conditions at the market during the years following 1933, that he duly weighed them, and nevertheless concluded that rates similar to those in the 1933 order were proper.

But the market agencies go beyond saying that the record did not warrant what the Secretary found. They say that bias disqualified him. This serious charge derives from a letter written by the Secretary to the *New York Times* immediately following the decision of this Court in the second Morgan case, 304 U.S. 1. By that decision, the Court had upset the order of 1933 because of procedural defects. Largely because of his assumption that this meant the return of the impounded funds to the market agencies, the Secretary in his letter vigorously criticized the decision. The market agencies in due course moved to disqualify the Secretary in the proceedings started by him to fix new rates. In denying their motion the Secretary wrote a patently sincere denial of bias. He stated that he had complained against a return of the impounded funds to the market agencies prior to a determination of the rates on the merits, that the denial of the petition for rehearing . . . had shown him the error of his assumption, that in his letter of criticism he made no prejudgment about the rates to be fixed, and that his only concern was to "see that the substantive rights of the parties are fairly determined." He added that "as a matter of expediency" he might have disqualified himself but for the fact that, while the market agencies were pressing his disqualification, they were simultaneously urging that none other than the Secretary had legal authority to make the rate order. Plainly enough, when it was thus suggested that he create a situation in which no order could be

made, the Secretary was offered no escape from his duty even had he preferred to consult the comforts of personal convenience.

But, intrinsically, the letter did not require the Secretary's dignified denial of bias. That he not merely held, but expressed, strong views on matters believed by him to have been in issue, did not unfit him for exercising his duty in subsequent proceedings ordered by this Court. As well might it be argued that the judges below, who had three times heard this case, had disqualifying convictions. In publicly criticizing this Court's opinion the Secretary merely indulged in a practice familiar in the long history of Anglo-American litigation, whereby unsuccessful litigants and lawyers give vent to their disappointment in tavern or press. Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances. Nothing in this record disturbs such an assumption.

And so we conclude that the order of the Secretary furnishes "the appropriate basis for action in the district court in making distribution of the fund in its custody." *United States v. Morgan*, 307 U.S. 183, 198. But, finally, a matter not touching the validity of the order requires consideration. Over the Government's objection the district court authorized the market agencies to take the deposition of the Secretary. The Secretary thereupon appeared in person at the trial. He was questioned at length regarding the process by which he reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates. His testimony shows that he dealt with the enormous record in a manner not unlike the practice of judges in similar situations, and that he held various conferences with the examiner who heard the evidence. Much was made of his disregard of a memorandum from one of his officials who, on reading the proposed order, urged considerations favorable to the market agencies. But the short of the business is that the Secretary should never have been subjected to this examination. The proceeding before the Secretary "has a quality resembling that of a judicial proceeding." *Morgan v. United States*, 298 U.S. 468, 480. Such an examination of a judge would be destructive of judicial responsibility. We have explicitly held in this

very litigation that "it was not the function of the court to probe the mental processes of the Secretary." 304 U.S. 1, 18. Just as a judge cannot be subjected to such a scrutiny, . . . so the integrity of the administrative process must be equally respected. . . . It will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other. . . .

### DIFFERENCES BETWEEN THE JUDICIAL AND THE ADMINISTRATIVE PROCESSES

#### *Federal Communications Commission v. Pottsville Broadcasting Co.*

309 U.S. 134 (1940)

Under the Federal Communications Act of 1934, the Federal Communications Commission must be guided by the test of "public convenience, interest, or necessity" when it passes upon applications for permission to construct broadcasting stations. The Commission had denied the Pottsville Broadcasting Company's application to erect a station at Pottsville, Pennsylvania, partly on the ground that the company was financially disqualified to operate the station. Reversed by the Court of Appeals for the District of Columbia, the Commission set the application for hearing along with other applications, in order to be able to reach a decision on a comparative basis. Again the company appealed to the court, which ordered the Commission to pass on the company's original application, independently of the applications subsequently filed by its competitors. The court justified its action on the theory that a lower court must obey the mandate of a higher tribunal.

The Supreme Court, through Justice Frankfurter, decided that the Federal Communications Commission was free to reconsider the application together with the other applications to determine which would best serve the public interest, and that the Court of Appeals could not require a rehearing of the first application on the original record. In the course of announcing this conclusion, Mr. Justice Frankfurter discussed the differences in origin and function between the judicial and administrative processes, saying in part:

. . . . .

Adequate appreciation of the facts presently to be summarized requires that they be set in their legislative framework. In its essentials the Communications Act of 1934 derives from the Federal Radio Act of 1927. . . . By this Act Congress, in order to protect the national interest involved in the new and far-reaching science of broadcasting, formulated a unified and comprehensive regulatory system for the industry. (\*) The common factors in the administration of the various statutes by which Congress had supervised the different modes of communication led to the creation, in the Act of 1934, of the Communications Commission. But the objectives of the legislation have remained substantially unaltered since 1927.

Congress moved under the spur of a widespread fear that in the absence of governmental control the public interest might be subordinated to monopolistic domination in the broadcasting field. To avoid this Congress provided for a system of permits and licenses. Licenses were not to be granted for longer than three years. . . . No license was to be "construed to create any right, beyond the terms, conditions, and periods of the license." . . . In granting or withholding permits for the construction of stations, and in granting, denying, modifying or revoking licenses for the operation of stations, "public convenience, interest, or necessity" was the touchstone for the exercise of the Commission's authority. While this criterion is as concrete as the complicated factors for judgment in such a field of delegated authority permit, it serves as a supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy. Necessarily, therefore, the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions—were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest. . . . Underlying the whole law is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors. Thus, it is highly significant that although investment in broadcasting stations may be large, a license may not be issued for more than three

years; and in deciding whether to renew the license, just as in deciding whether to issue it in the first place, the Commission must judge by the standard of "public convenience, interest, or necessity." The Communications Act is not designed primarily as a new code for the adjustment of conflicting private rights through adjudication. Rather it expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission. (\*)

Against this background the facts of the present case fall into proper perspective. In May, 1936, The Pottsville Broadcasting Company, respondent here, sought from the Commission a permit . . . for the construction of a broadcasting station at Pottsville, Pennsylvania. The Commission denied this application on two grounds: (1) that the respondent was financially disqualified; and (2) that the applicant did not sufficiently represent local interests in the community which the proposed station was to serve. From this denial of its application respondent appealed to the court below. That tribunal withheld judgment on the second ground of the Commission's decision, for it did not deem this to have controlled the Commission's judgment. But, finding the Commission's conclusion regarding the respondent's lack of financial qualification to have been based on an erroneous understanding of Pennsylvania law, the Court of Appeals reversed the decision and ordered the "cause . . . remanded to the . . . Communications Commission for reconsideration in accordance with the views expressed." . . .

Following this remand, respondent petitioned the Commission to grant its original application. Instead of doing so, the Commission set for argument respondent's application along with two rival applications for the same facilities. The latter applications had been filed subsequently to that of respondent and hearings had been held on them by the Commission in a consolidated proceeding, but they were still undisposed of when the respondent's case returned to the Commission. With three applications for the same facilities thus before it, and the facts regarding each having theretofore been explored by appropriate procedure, the Commission directed that all three be set down for argument before it to determine which, "on a comparative basis" "in the judgment of the Commission will best serve public interest." At this stage of the proceedings, respondents sought and obtained from the Court of Appeals the writ of mandamus now under review. That writ commanded the Commission to



set aside its order designating respondent's application "for hearing on a comparative basis" with the other two, and "to hear and reconsider the application" of The Pottsville Broadcasting Company "on the basis of the record as originally made and in accordance with the opinions" of the Court of Appeals in the original review . . . and in the mandamus proceedings. . . .

The Court of Appeals invoked against the Commission the familiar doctrine that a lower court is bound to respect the mandate of an appellate tribunal and cannot reconsider questions which the mandate has laid at rest. . . . That proposition is indisputable, but it does not tell us what issues were laid at rest. . . . Nor is a court's interpretation of the scope of its own mandate necessarily conclusive. To be sure the court that issues a mandate is normally the best judge of its content, on the general theory that the author of a document is ordinarily the authoritative interpreter of its purposes. But it is not even true that a lower court's interpretation of its mandate is controlling here. . . . Therefore, we would not be foreclosed by the interpretation which the Court of Appeals gave to its mandate, even if it had been directed to a lower court.

A much deeper issue, however, is here involved. This was not a mandate from court to court but from a court to an administrative agency. What is in issue is not the relationship of federal courts *inter se*—a relationship defined largely by the courts themselves—but the due observance by courts of the distribution of authority made by Congress as between its power to regulate commerce and the reviewing power which it has conferred upon the courts under Article III of the Constitution. A review by a federal court of the action of a lower court is only one phase of a single unified process. But to the extent that a federal court is authorized to review an administrative act, there is superimposed upon the enforcement of legislative policy through administrative control a different process from that out of which the administrative action under review ensued. The technical rules derived from the interrelationship of judicial tribunals forming a hierarchical system are taken out of their environment when mechanically applied to determine the extent to which Congressional power, exercised through a delegated agency, can be controlled within the limited scope of "judicial power" conferred by Congress under the Constitution.

Courts, like other organisms, represent an interplay of form and function. The history of Anglo-American courts and the more or

less narrowly defined range of their staple business have determined the basic characteristics of trial procedure, the rules of evidence, and the general principles of appellate review. Modern administrative tribunals are the outgrowth of conditions far different from those. (\*) To a large degree they have been a response to the felt need of governmental supervision over economic enterprise—a supervision which could effectively be exercised neither directly through self-executing legislation nor by the judicial process. That this movement was natural and its extension inevitable, was a quarter century ago the opinion of eminent spokesmen of the law. (\*) Perhaps the most striking characteristic of this movement has been the investiture of administrative agencies with power far exceeding and different from the conventional judicial modes for adjusting conflicting claims—modes whereby interested litigants define the scope of the inquiry and determine the data on which the judicial judgment is ultimately based. Administrative agencies have power themselves to initiate inquiry, or, when their authority is invoked, to control the range of investigation in ascertaining what is to satisfy the requirements of the public interest in relation to the needs of vast regions and sometimes the whole nation in the enjoyment of facilities for transportation, communication and other essential public services. (\*) These differences in origin and function preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts. Thus, this Court has recognized that bodies like the Interstate Commerce Commission, into whose mould Congress has cast more recent administrative agencies, “should not be too narrowly constrained by technical rules as to the admissibility of proof,” . . . should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties. (\*) . . . To be sure, the laws under which these agencies operate prescribe the fundamentals of fair play. They require that interested parties be afforded an opportunity for hearing and that judgment must express a reasoned conclusion. But to assimilate the relation of these administrative bodies and the courts to the relationship between lower and upper courts is to disregard the origin and purposes of the movement for administrative regulation and at the same time to disregard the traditional scope, however far-reaching, of the judicial process. Unless these vital differentiations between the functions of judicial and administrative tribunals are

observed, courts will stray outside their province and read the laws of Congress through the distorting lenses of inapplicable legal doctrine.

Under the Radio Act of 1927 as originally passed, the Court of Appeals was authorized in reviewing action of the Radio Commission to "alter or revise the decision appealed from and enter such judgment as to it may seem just." §16 of the Radio Act of 1927, 44 Stat. 1169. Thereby the Court of Appeals was constituted "a superior and revising agency in the same field" as that in which the Radio Commission acted. . . . Since the power thus given was administrative rather than judicial, the appellate jurisdiction of this Court could not be invoked. . . . To lay the basis for review here, Congress amended §16 so as to terminate the administrative oversight of the Court of Appeals. . . . In "sharp contrast with the previous grant of authority" the court was restricted to a purely judicial review. "Whether the Commission applies the legislative standards validly set up, whether it acts within the authority conferred or goes beyond it, whether its proceedings satisfy the pertinent demands of due process, whether, in short, there is compliance with the legal requirements which fix the province of the Commission and govern its action, are appropriate questions for judicial decision." *Federal Radio Comm'n v. Nelson Bros. Co.*, 289 U.S. 266, 276.

On review the court may thus correct errors of law and on remand the Commission is bound to act upon the correction. . . . But an administrative determination in which is imbedded a legal question open to judicial review does not impliedly foreclose the administrative agency, after its error has been corrected, from enforcing the legislative policy committed to its charge. . . .

The Commission's responsibility at all times is to measure applications by the standard of "public convenience, interest, or necessity." The Commission originally found respondent's application inconsistent with the public interest because of an erroneous view regarding the law of Pennsylvania. The Court of Appeals laid bare that error, and, in compelling obedience to its correction, exhausted the only power which Congress gave it. At this point the Commission was again charged with the duty of judging the application in the light of "public convenience, interest, or necessity." The fact that in its first disposition the Commission had committed a legal error did not create rights of priority in the respondent, as against the later applicants, which it would not have otherwise possessed.

Only Congress could confer such a priority. It has not done so. The Court of Appeals cannot write the principle of priority into the statute as an indirect result of its power to scrutinize legal errors in the first of an allowable series of administrative actions. Such an implication from the curtailed review allowed by the Communications Act is at war with the basic policy underlying the statute. It would mean that for practical purposes the contingencies of judicial review and of litigation, rather than the public interest, would be decisive factors in determining which of several pending applications was to be granted.

It is, however, urged upon us that if all matters of administrative discretion remain open for determination on remand after reversal, a succession of single determinations upon single legal issues is possible with resulting delay and hardship to the applicant. It is always easy to conjure up extreme and even oppressive possibilities in the exertion of authority. But courts are not charged with general guardianship against all potential mischief in the complicated tasks of government. The present case makes timely the reminder that "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." . . . Congress which creates and sustains these agencies must be trusted to correct whatever defects experience may reveal. Interference by the courts is not conducive to the development of habits of responsibility in administrative agencies. Anglo-American courts as we know them are themselves in no small measure the product of a historic process.

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### "A POWER AS OLD AS THE JUDICIAL SYSTEM OF THE NATION"

*Scripps-Howard Radio, Inc. v.  
Federal Communications Commission*

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316 U.S. 4 (1942)

Scripps-Howard, Inc., which operates a radio station in Cincinnati, sought to restrain the Federal Communications Commission from enforcing its order permitting a station at Columbus to change its frequency

and to increase its power. The Commission had granted the application of the Columbus station without hearing, but Scripps-Howard desired a hearing in order to show that the effect of this action would be to decrease its own service to the listeners in Cincinnati. When the Commission denied the request, Scripps-Howard asked the Court of Appeals for the District of Columbia to stay the Commission's order pending the disposition of the appeal. When the full court of six judges heard the argument it was equally divided, and so the question whether it had the power to stay the Commission's order was certified to the Supreme Court.

In an opinion by Justice Frankfurter, the Supreme Court answered the question in the affirmative, holding that in order to preserve the status quo the Court of Appeals had power to stay the execution of the Commission's order, pending final determination of the appeal. It has always been within the power of courts to stay administrative action if, in their judgment, not to do so would result in irreparable damage to the parties or to the public interest.

The dissenters—Justices Douglas and Murphy—construed the section of the Federal Communications Act exempting certain classes of orders from court review as not permitting the Court of Appeals to stay the Commission's action. They chided the majority for ignoring what was said in the Pottsville Broadcasting Co. case, particularly that the relationship between courts and administrative agencies is not the same as that between appellate and lower courts. Justice Frankfurter's answer was that the power to stay is "as old as the judicial system of the nation."

Mr. Justice Frankfurter's opinion for the Court said in part:

. . . . .  
... On October 10, 1939, the Commission granted without hearing the application of WCOL, Inc., licensee of Station WCOL, Columbus, Ohio, for a construction permit to change its frequency from 1210 to 1200 kilocycles and to increase its power from 100 to 250 watts. The appellant, Scripps-Howard Radio, Inc., which is the licensee of Station WCPO, Cincinnati, Ohio, operating on a frequency of 1200 kilocycles with power of 250 watts, filed a petition for "hearing or rehearing" requesting the Commission to vacate its previous order and set the WCOL application for hearing. The Commission denied this petition on March 29, 1940, and an appeal followed. In its statement of "reasons for appeal," the appellant claimed that the Commission could not lawfully grant the WCOL application without hearing; that in granting the application the

Commission departed from its rules and standards of good engineering practice; that the appellant was entitled to a hearing in order to show that the Commission's action did not serve the public interest since it would result in materially reducing the coverage of Station WCPO and thereby deprive a substantial number of listeners of "the only local regional non-network service" available to them; and that in granting the WCOL application without hearing, the Commission violated the Due Process Clause of the Fifth Amendment.

The appellant asked the Court of Appeals to stay the Commission's order pending the disposition of its appeal. Even though the Court "had consistently over a long period of years, and without objection on the part of the Commission, issued stay orders" in cases where such orders were found to be necessary, the Commission opposed the issuance of a stay order in this case on the ground that the Court was without power to grant a stay. The application was heard before the Court sitting with three judges, which, with one judge dissenting, upheld the Commission's contention. A motion for rehearing before all six members of the Court was granted. The judges being equally divided on the question of the Court's power to grant a stay, the following question was certified to us:

"Where, pursuant to the provisions of Section 402 (b) of the Communications Act of 1934, an appeal has been taken, to the United States Court of Appeals, from an order of the Federal Communications Commission, does the court, in order to preserve the status quo pending appeal, have power to stay the execution of the Commission's order from which the appeal was taken, pending the determination of the appeal?"

. . . . .

The Communications Act of 1934 is a hybrid. By that Act Congress established a comprehensive system for the regulation of communication by wire and radio. To secure effective execution of its policy of making available "a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges," Congress created a new agency, the Federal Communications Commission, to which it entrusted authority previously exercised by several other agencies. Under the Radio Act of 1927, . . . the Federal Radio Commission had broad

powers over the licensing and regulation of radio facilities. The Mann-Elkins Act of 1910 . . . gave the Interstate Commerce Commission general regulatory authority over telephone and telegraph carriers. In addition, the Postmaster General was empowered, under the Post Roads Act of 1866, . . . to fix rates on government telegrams. (\*) The Communications Act of 1934 was designed to centralize this scattered regulatory authority in one agency. . . .

The provisions for judicial review in the Act of 1934 reflect its mixed origins. Section 402 (a) makes the provisions of the Urgent Deficiencies Act of October 22, 1913, . . . pertaining to judicial review of orders of the Interstate Commerce Commission, applicable to "suits to enforce, enjoin, set aside, annul, or suspend any order of the Commission under this Act (except any order of the Commission granting or refusing an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license)." . . . The Urgent Deficiencies Act, which is thus incorporated in §402 (a) of the Communications Act of 1934, provides for review in a specially constituted district court, with direct appeal to this Court. That Act authorizes the District Court, in cases "where irreparable damage would otherwise ensue to the petitioner," to allow a temporary stay of the order under review, subject to specified safeguards. . . .

Section 402 (b) of the Communications Act of 1934 provides for review of the orders excepted from §402 (a). It gives an appeal "from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases: (1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission. (2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing such application." . . . This section follows §16 of the Radio Act of 1927 . . . as amended in 1930, . . .

Thus, in both the Radio Act of 1927 and the Communications Act of 1934, orders granting or denying applications for construction permits or station licenses and for renewal or modification of licenses were made reviewable by the Court of Appeals for the

District of Columbia. (\*) And with respect to such appeals, both §16 of the Radio Act and §402 (b) of the Communications Act were silent with respect to the power of the Court of Appeals to stay orders pending appeal. It is upon this silence in the Communications Act that the Commission bases its contention, made for the first time when this litigation arose in 1940, that the Court is without such power.

No court can make time stand still. The circumstances surrounding a controversy may change irrevocably during the pendency of an appeal, despite anything a court can do. But within these limits it is reasonable that an appellate court should be able to prevent irreparable injury to the parties or to the public resulting from the premature enforcement of a determination which may later be found to have been wrong. It has always been held, therefore, that as part of its traditional equipment for the administration of justice, (\*) a federal court can stay the enforcement of a judgment pending the outcome of an appeal. . . .

Generally speaking, judicial review of administrative orders is limited to determining whether errors of law have been committed. . . . Because of historical differences in the relationship between administrative bodies and reviewing courts and that between lower and upper courts, a court of review exhausts its power when it lays bare a misconception of law and compels correction. . . . If the administrative agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the courts, such judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made. The existence of power in a reviewing court to stay the enforcement of an administrative order does not mean, of course, that its exercise should be without regard to the division of function which the legislature has made between the administrative body and the court of review. "A stay is not a matter of right, even if irreparable injury might otherwise result to the appellant. . . . It is an exercise of judicial discretion. The propriety of its issue is dependent upon the circumstances of the particular case." *Virginian Ry. Co. v. United States*, 272 U.S. 658, 672-73; . . .

These controlling considerations compel the assumption that Congress would not, without clearly expressing such a purpose, deprive the Court of Appeals of its customary power to stay orders



under review. It is urged that such a manifestation appears in the provisions for judicial review contained in the Communications Act of 1934. Specifically, the Commission contends that since §402 (a) incorporates the provisions of the Urgent Deficiencies Act of 1913 which explicitly authorize and regulate the issuance of stay orders, the omission of any reference in §402 (b) to a power to stay orders under review reflects a deliberate Congressional choice to deprive the Court of Appeals of this power.

The search for significance in the silence of Congress is too often the pursuit of a mirage. We must be wary against interpolating our notions of policy in the interstices of legislative provisions. Here Congress said nothing about the power of the Court of Appeals to issue stay orders under §402 (b). But denial of such power is not to be inferred merely because Congress failed specifically to repeat the general grant of auxiliary powers to the federal courts. The Commission argues that the silence of Congress, in view of the legislative history of the Act and the nature of the orders reviewable under the Act, qualifies this general authority and is as commanding as if Congress had expressly withheld from the Court of Appeals the power to stay orders appealed under §402 (b).

The legislative history can furnish no support for this contention. Neither the committee reports nor the hearings nor the debates contain any reference to the power to stay Commission orders on appeal. . . .

It is indisputable that, at least since 1930, the Court of Appeals has been staying orders both of the Federal Radio Commission, under §16 of the Radio Act of 1927, and of the Federal Communications Commission, under §402 (b) of the Communications Act of 1934, whenever stays were regarded as necessary. To be sure, in only one case . . . did the Court of Appeals even refer to the granting of a stay order. The explanation is not hard to find. The power to stay was so firmly imbedded in our judicial system, so consonant with the historic procedures of federal appellate courts, that there was no necessity for the Court of Appeals to justify its settled practice. (\*)

The considerations of policy which are invoked are as fragile as the legislative materials are inapposite. It is said that the nature of the orders reviewable under §402 (b) makes the grant of a

stay order manifestly inappropriate since a stay would in effect involve the judicial exercise of an administrative function. An example is adduced of an appeal from an order denying an application for a construction permit or a station license, or for modification or renewal of a license. Of course, no court can grant an applicant an authorization which the Commission has refused. No order that the Court of Appeals could make would enable an applicant to go on the air when the Commission has denied him a license to do so. A stay of an order denying an application would in the nature of things stay nothing. It could not operate as an affirmative authorization of that which the Commission has refused to authorize. But this is no reason for denying the Court the power to issue a stay in a situation where the function of the stay is to avoid irreparable injury to the public interest sought to be vindicated by the appeal.

The Communications Act of 1934 did not create new private rights. The purpose of the Act was to protect the public interest in communications. By §402 (b) (2) Congress gave the right of appeal to persons "aggrieved or whose interests are adversely affected" by Commission action. . . . But these private litigants have standing only as representatives of the public interest. . . . That a court is called upon to enforce public rights and not the interests of private property does not diminish its power to protect such rights. . . . An historic procedure for preserving rights during the pendency of an appeal is no less appropriate—unless Congress has chosen to withdraw it—because the rights to be vindicated are those of the public and not of the private litigants. Unless Congress explicitly discloses such an intention we should not lightly attribute to it a desire to withhold from a reviewing court the power to save the public interest from injury or destruction while an appeal is being heard. To do so would stultify the purpose of Congress to utilize the courts as a means for vindicating the public interest. Courts and administrative agencies are not to be regarded as competitors in the task of safeguarding the public interest. . . . Courts no less than administrative bodies are agencies of government. Both are instruments for realizing public purposes.

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Judged by its own terms, its history, and the practice under it,

the Communications Act of 1934 affords no warrant for depriving the Court of Appeals of the conventional power of an appellate court to stay the enforcement of an order pending the determination of an appeal challenging its validity. Indirect light is sometimes cast upon legislation by provisions dealing with the same problem in related enactments. No such light is shed here. The numerous laws in which Congress has established administrative agencies for the exercise of its regulatory powers do not disclose any general legislative policy regarding the power to stay administrative orders pending review. Some statutes are wholly silent; (\*) some turn a court review into an automatic stay; (\*) some provide that the commencement of a suit shall not operate as a stay unless the court specifically so provides; (\*) some authorize the reviewing court to grant a stay where necessary. (\*) Significantly, the recent Emergency Price Control Act of 1942 . . . explicitly denies the power of the reviewing court to enjoin enforcement of the administrative orders.

The various enactments in which the staying power is made explicit, as well as the statutes that are silent about it, afford debating points but no reliable aids in construing the Act before us. One thing is clear. Where Congress wished to deprive the courts of this historic power, it knew how to use apt words—only once has it done so and in a statute born of the exigencies of war.

We conclude that Congress by §402 (b) of the Communications Act of 1934 has not deprived the Court of Appeals of the power to stay—a power as old as the judicial system of the nation. . . .

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### “THE UNFORTUNATE EFFECTS OF PREMATURE JUDICIAL REVIEW”

*Columbia Broadcasting System v. United States*

316 U.S. 407, 429 (1942)

After studying the problem for more than three years, the Federal Communications Commission issued chain broadcasting regulations in May, 1941, proscribing certain practices by the country's radio net-

works. One of these regulations announced that in the future a station would not have its license renewed if its contracts with a network called for any of the outlawed practices. Exactly thirteen months later, the Supreme Court of the United States, with Chief Justice Stone presenting its opinion, held that since the new policy, if valid, would alter the contractual rights of the networks, a network organization was entitled to a judicial determination of the validity of the regulations without awaiting action by the Commission enforcing them against a particular station licensee.

Mr. Justice Frankfurter, with whom Justices Reed and Douglas were in agreement, dissented, contending that the Commission's action was not ripe for judicial review. He analyzed in some detail the criteria for determining when an administrative decision is reviewable by the courts. (A year later Mr. Justice Frankfurter wrote the Court's decision upholding the chain broadcasting regulations as within the broad statutory authority conferred on the Commission by Congress. *National Broadcasting Co. v. United States*, 319 U.S. 190.)

Mr. Justice Frankfurter's dissenting opinion in *Columbia Broadcasting System v. United States* read in part:

The criteria governing judicial review of "orders" under the Urgent Deficiencies Act were defined by a unanimous Court in *United States v. Los Angeles & S.L.R. Co.*, 273 U.S. 299, 309-10: "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation." If "broadcasting company" were substituted for "carrier," this analysis of the legal consequences of the action of the Interstate Commerce Commission in the Los Angeles case would fit perfectly the legal consequences of the action of the Federal Communications Commission in making public the challenged regulations.

The fact that an action of an administrative agency occasions even irreparable loss does not in itself afford sufficient grounds for judicial review. Even if the Commission committed a wrong, the question of judicial reviewability still remains that put in the Los Angeles case, 273 U.S. at 313, to wit, is it "a wrong for which Congress provides a remedy under the Urgent Deficiencies Act" of

October 22, 1913, . . . as incorporated in §402 (a) of the Communications Act of 1934?

For Congress has not authorized resort to the federal courts merely because someone feels aggrieved, however deeply, by an action of the Federal Communications Commission. A District Court of the United States can take a case only when Congress has authorized that type of case to be taken. Congress did not leave opportunity for reviewing damaging action by the Federal Communications Commission to the general equity powers of the district courts. It circumscribed the power of the courts in relation to the Commission in the most detailed way. Its incorporation by reference, in the Communications Act of 1934, of the scope of review allowed in reviewing an "order" of the Interstate Commerce Commission gave all the precise, definite, and technical boundaries which the concept of a reviewable "order" had acquired through the decisions of this Court prior to the enactment of the Communications Act. The precise requirements of an "order" of the Commission for purposes of judicial review are therefore as inflexible as though they were written into the Act itself.

Our problem, then, is this: Does the issuance of the chain broadcasting regulations constitute an "order" reviewable in a proceeding brought under §402 (a) of the Communications Act, in the light of the settled rules for determining what such an "order" is when a determination of the Interstate Commerce Commission is made the basis of judicial review. It is therefore necessary to put out of mind what this case is not. It is not the invocation of equity jurisdiction in order to avoid threatened irreparable harm resulting from the criminal enforcement of an unconstitutional statute . . . Nor do we have here a resort to equity because it is essential for the protection of asserted rights that criminal prosecutions unauthorized by law be restrained . . .

In promulgating these regulations the Communications Commission merely announced its conception of one aspect of the public interest, namely, the relationship of certain provisions in network-affiliation contracts to the obligation of a station licensee to render the most effective service to the listening public. The regulations themselves determine no rights. They alter the status of neither the networks nor licensees. As such they require nobody—neither the networks, the licensees, nor the Commission—to do any—

thing. They are merely an announcement to the public of what the Commission intends to do in passing upon future applications for station licenses. No action of the stations or the networks can violate the regulations, for there is nothing the regulations require them to do or refrain from doing.

Announcements of general policies intended to be followed by administrative agencies customarily take any one of various forms. Sometimes they are noted in the agency's annual report to Congress, sometimes in a public announcement or press release, and sometimes, as was the case here, they are published as "rules" or "regulations." . . . But whatever form such announcements may take, their nature and effect is the same. The reason why the Commission formulated its chain broadcasting policy in the form of a "regulation" is given in its report: "We believe that the announcement of the principles we intend to apply in exercising our licensing power will expedite business and further the ends of justice. . . . Good administrative practice would seem to demand that such a statement of policy or rules and regulations be promulgated wherever sufficient information is available upon which they may be based." . . .

With respect to its jurisdiction over matters relating to radio broadcasting, the Communications Commission is essentially a licensing agency. Its regulatory power over the industry is derived, for the most part, from its authority to grant and withhold station licenses. Under §309 of the Communications Act of 1934 the Commission is required to examine each application for a station license and to determine in each case whether a grant would serve public interest, convenience, or necessity. As was noted in *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138, the Act "expresses a desire on the part of Congress to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission." To that end, Congress established an administrative procedure under which the Commission must make a specific determination in each case whether the public interest would be served by granting the particular application before it. No announcement of general licensing policy can relieve the Commission of its statutory obligation to examine each application for a license and determine whether a grant or denial is required by the public interest.

The Commission recognized this fact in issuing these regulations. It explicitly stated that a determination of the requirements of the public interest will, in spite of the regulations, still have to be made in passing upon particular applications. . . .

. . . . .

The regulations do not, therefore, commit the Commission to any definite course of action in passing upon applications for licenses. Consistently with the regulations (and, parenthetically, consistently with the authority of the Commission to depart from general regulations where such departure is in the public interest . . .) the Commission is free to dilute them with amendments and exceptions. The construction of the regulations and their application to particular situations is still in the hands of the Commission. Administrative adjudication is still open. Before its completion it is not ripe for judicial review.

The characteristics of the administrative determination in all the cases on which the Court's opinion relies were wholly different. In each one the force of the law, either through criminal prosecution or injunction or fine or some other judicial remedy, could immediately be brought to bear to enforce the command of the administrative agency. In none of the cases was an administrative action held reviewable which in itself entailed no immediate legal consequences.

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This is not the first time that the federal courts have been urged to sit in judgment upon "practical business consequences" where the action to be reviewed did not represent the final stage of administrative adjudication. The arguments made in this case have been made in the past but heretofore have always been rejected by this Court. The classic formulation and application of the doctrine of finality as to orders under the Urgent Deficiencies Act was contained in *United States v. Los Angeles & S.L.R. Co.*, 273 U.S. 299. In view of the thoroughness of the argument at the bar, and the weightiness of the opinion, that case has ever since been regarded as furnishing the guideposts in this field of law. It should govern here.

. . . . .

To argue that irreparable injury implies reviewability is, in effect, to contend that there must be a remedy because the plaintiff claims serious damage. But in these situations—in reviewing “orders” under the Urgent Deficiencies Act—federal courts can give a remedy only to enforce a legal right, and a legal right cannot be derived merely by concluding that a particular claim of hardship should afford a remedy. While formally we may appear to be dealing with technicalities, behind these considerations lie deep issues of policy in the division of authority as between administrative agencies and courts in carrying out the constitutional will of Congress. The source of the misconception underlying the claim for equitable relief in this case is the assumption that this is merely an ordinary invocation of equity, as though it were a controversy between two litigants of which only the courts are or can be seized. What we are here concerned with is due regard for the proper distribution made by Congress of legal authority as between two law-enforcing agencies of government, the administrative and the judicial. . . .

This case illustrates anew the influence of a particular instance of felt hardship in derailing legal principles from customary tracks. But this is not an isolated case. If threatened damage through general pronouncement of policy for future administrative action, even if cast in the formal language of a regulation, is to give rise to equitable review apart from the rule that judicial review is premature because of want of administrative finality, the same basis of irreparable harm which is here equated to jurisdiction will bear rich litigious fruit in the case of “regulations” issued by the Securities and Exchange Commission which are damaging in their immediate repercussions to stock exchange and holding companies, or regulations announced by the Treasury for the guidance of taxpayers but which adversely affect business interests, or regulations by the Federal Power Commission, etc. Suppose, for example, that the Commissioner of Internal Revenue issues a ruling that profits derived by radio stations from their network operations are subject to a tax deemed by them onerous and illegal. Could a network successfully bring a suit in equity prior to the imposition of such taxes to invalidate the ruling on the ground that its practical consequence was the cancellation of or refusal to renew network affiliations? One had supposed that the answer was clearly no. But surely in principle the problem is essentially that of the cases before us.



A final consideration remains. We are not dealing with the reviewability of administrative orders *in vacuo*. The reviewability of an order of the Federal Communications Commission depends upon the statutory scheme of judicial review embodied in §402 of the Communications Act of 1934. Therefore, even if the regulations could be deemed to possess the essential attributes of a reviewable order, it would not inevitably follow that the order is reviewable in the manner provided for by §402 (a) of the Act. . . . Briefly, the Act created two avenues by which orders of the Federal Communications Commission were open to review by the federal courts. Under §402 (a), incorporating the provisions of the Urgent Deficiencies Act of October 22, 1913, . . . relating to judicial review of orders of the Interstate Commerce Commission, a suit to enforce, set aside, annul, or suspend an order of the Federal Communications Commission may be brought in a specially constituted district court, with a right of direct appeal to this Court, only if the order does not fall within the exceptions enumerated by §402 (b), namely, orders granting or denying applications for station licenses or construction permits and for renewal or modification of licenses. Review of the orders comprehended within §402 (b) is available only through an appeal to the Court of Appeals for the District of Columbia, with no right of direct appeal to this Court.

If the regulations do constitute an order, what kind of an order can it be? It must be in the nature of a blanket denial, operating *in futuro*, to be sure, of applications for renewal of station licenses. But the Act expressly precludes judicial review of orders denying renewal applications of licensees in any manner other than that prescribed by §402 (b), to wit, by an appeal to the Court of Appeals for the District of Columbia. As the court below held, the effect of taking jurisdiction in these cases is to substitute a different court and a different procedure for those specified by Congress. This Court has not in the past displayed such an indifference to the particularities of legislation defining the jurisdiction of the lower federal courts. . . .

Even if we were free to disregard the scheme for judicial review which Congress has established, I could not agree that an appeal under §402 (b) would not be an adequate means for testing the claims made in the present litigation. There is essentially only one issue on the merits in this proceeding, namely, whether the adop-

tion by the Commission of the policies expressed in the regulations transgresses its statutory and constitutional authority. But this issue could be raised and fully determined in an appeal under §402 (b) from an order denying a renewal application. Indeed, in its Minute of October 31, 1941, the Commission explicitly stated that the validity of the regulations could be put in issue in a renewal proceeding. If anything, therefore, the issues in an appeal under §402 (b) would be broader and not narrower than the issues here. Moreover, since the reasonableness of the application of the regulations to the particular situation would also be in issue in the renewal proceeding, the reviewing court would have before it a record containing elements of concreteness and particularity not present in the record now before us.

The Commission's Minute enables a licensee to contest the validity of the regulations, or the reasonableness of applying them to the particular case, without fear of losing its license. "In order to insure that the station may remain on the air and be in no way injured by any such Commission proceeding [contesting the validity of the regulations] and appeal to court from a decision in such proceeding, the Commission will grant such licensee a temporary extension of its license, with renewals from time to time until there has been a final determination of the issues raised at such hearing. In the event of such litigation, and if the validity of the application of the Chain Broadcasting Regulations to such licensee is sustained by the courts, the Commission will nevertheless grant a regular license to the licensee, otherwise entitled thereto, who has unsuccessfully litigated that issue, if the licensee thereupon conforms to the decision."

Plainly, therefore, a licensee is under no compulsion to cancel or modify its affiliation contract. Licensees who regard the regulations as invalid are free to continue their existing contracts and at the same time challenge the regulations in the orderly manner provided by the Act—and without any danger of losing their right to continue broadcasting. Similarly, the interests of the networks may be protected through intervention in renewal proceedings. Under the Commission's procedure, . . . where a renewal application is designated for hearing because of the licensee's contractual arrangements with others, the latter are customarily permitted to intervene. . . .

We need to go no farther than this litigation to perceive the un-

fortunate effects of premature judicial review. The chain broadcasting regulations were issued on May 2, 1941, more than a year ago. They were adopted by the Commission as a consequence of its finding, after an investigation lasting more than three years, that certain features of network-affiliation contracts prevented licensees from effectively discharging their obligation to render the fullest service to the listening public. The policy formulated by the Commission may or may not be wise—that is not our concern. But we cannot blink the fact that this litigation has for more than a year prevented the Commission from testing by experience the practical wisdom of a policy found by it to be required by the public interest. The commencement of a proceeding under §402 (b) would not have presented the jurisdictional problems present in this proceeding. Surely those desirous of a speedy adjudication of the issue of the validity of the regulations were aware that the commencement of a proceeding under §402 (a) would not produce a prompt adjudication on the merits, but that it would instead result in postponing for a considerable period the effective date of the regulations, with all the contingent advantages afforded by such postponement.

Hardship there may well come through action of an administrative agency. But to slide from recognition of a hardship to assertion of jurisdiction is once more to assume that only the courts are the guardians of the rights and liberties of the people. In denying that it had power to review the action of the Federal Communications Commission because that body had not yet determined a legal right, the court below, as Judge Learned Hand's opinion abundantly proves, was not respecting a rule of etiquette. On the contrary, it merely recognized that the federal courts are entrusted with the correction of administrative errors or wrong-doing only to the extent of Congressional authorization. To say that the courts should reject the doctrine of administrative finality and take jurisdiction whenever action of an administrative agency may seriously affect substantial business interests, regardless of how intermediate or incomplete the action may be, is, in effect, to imply that the protection of legal interests is entrusted solely to the courts. The unbroken current of this Court's decisions in construing the scope of judicial review under the Urgent Deficiencies Act, and which is the only warrant for jurisdiction in this case, repels such a contention. The decision should therefore be affirmed.

THE GROUNDS FOR ADMINISTRATIVE ACTION MUST BE "CLEARLY  
DISCLOSED AND ADEQUATELY SUSTAINED"

*Securities and Exchange Commission v.  
Chenery Corp.*

318 U.S. 80 (1943)

While plans for the reorganization of a public utility holding company were under consideration by the Securities and Exchange Commission, the officers and directors who were managing the company acquired a certain amount of preferred stock, which they sought to have the Commission allow them to convert into stock of the reorganized company on the same basis as all other preferred stock. This the Commission refused to do when it finally approved the plan for the reorganization of the company. They were required to surrender it at the price they paid for it, plus four per cent interest. The Commission had never adopted a rule forbidding such purchases by the managers of a company in the process of reorganization under the Holding Company Act of 1935. It based its action on principles of equity prohibiting persons occupying positions of trust from taking advantage of their special status for their own benefit.

Mr. Justice Frankfurter led the Court in sending the Commission's order back to the Court of Appeals for further proceedings, holding that in keeping with the principles of equity applied by the Commission, a finding of wrongdoing by the managers was necessary. The Commission did not accuse the managers of misusing their position by taking advantage of the corporation, the stockholders, or the investing public. It merely concluded that the plan urged by the officers who had managed the company would be "unfair, inequitable, and detrimental, so long as the preferred stock purchased by the management at low prices is to be permitted to share on a parity with other preferred stock." However, a majority of the Supreme Court were of the view that it was not enough for the Commission to assert that its action was in furtherance of the interests which Congress directed it to protect. If courts are to discharge properly their duty of review, administrative agencies must make clear by appropriate findings the reasons for the action they have taken: "The orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained."

To Mr. Justice Black, on the other hand, the grounds for the Com-

mission's order were perfectly clear. Granted that the managers of the corporation were acting in a fiduciary capacity, it was obvious that the Commission decided that they should not be permitted to reap "un-conscionable profit" from stock which they had acquired when they were in a position to have information which other stockholders did not have. (In the reorganized company, the book value of the stock they purchased was to be four times the price they paid for it.) Since the Commission's intention was clear, to require it to spell out in detail why its decision was in effectuation of the policies of the law under which it was acting, would only hamper its work and devitalize the process of administration through excessive judicial control. Said Justice Black:

"While I consider that the cases on which the Commission relied give full support to the conclusion it reached, I do not suppose, as the Court does, that the Commission's rule is not fully based on Commission experience. The Commission did not 'explicitly disavow' any reliance on what its members had learned in their years of experience, and of course they, as trade experts, made their findings that respondent's practice was 'detrimental to the interests of investors' in the light of their knowledge. That they did not unduly parade fact data across the pages of their reports is a commendable saving of effort since they meant merely to announce for their own jurisdiction an obvious rule of honest dealing closely related to common law standards. Of course, the Commission can now change the form of its decision to comply with the Court order. The Court can require the Commission to use more words; but it seems difficult to imagine how more words or different words could further illuminate its purpose or its determination. A judicial requirement of circumstantially detailed findings as the price of court approval can bog the administrative power in a quagmire of minutiae. Hypercritical exactions as to findings can provide a handy but an almost invisible glideway enabling courts to pass 'from the narrow confines of law into the more spacious domain of policy.' " (The words quoted by Justice Black are from Justice Frankfurter's opinion for the Court in *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 194.) Justices Reed and Murphy joined in Justice Black's dissent. Justice Douglas, himself a former chairman of the Securities and Exchange Commission, did not participate in the case.

Four years later, after the Commission had furnished findings deemed satisfactory by a majority of the Court, its action was upheld. *Securities and Exchange Commission v. Chenery Corp.*, 332 U.S. 194. Justices Frankfurter and Jackson dissented.

Mr. Justice Frankfurter's opinion for the Court in the first *Chenery* case said in part:

The respondents, who were officers, directors, and controlling stockholders of the Federal Water Service Corporation (hereafter called Federal), a holding company registered under the Public Utility Holding Company Act of 1935, . . . brought this proceeding under §24 (a) of the Act to review an order made by the Securities and Exchange Commission on September 24, 1941, approving a plan of reorganization for the company. Under the Commission's order, preferred stock acquired by the respondents during the period in which successive reorganization plans proposed by the management of the company were before the Commission, was not permitted to participate in the reorganization on an equal footing with all other preferred stock. . . .

. . . In 1937, Federal was a typical public utility holding company. Incorporated in Delaware, its assets consisted of securities of subsidiary water, gas, electric, and other companies in thirteen states and one foreign country. The respondents controlled Federal through their control of its parent, Utility Operators Company, which owned all of the outstanding shares of Federal's Class B common stock, representing the controlling voting power in the company. On November 8, 1937, when Federal registered as a holding company under the Public Utility Holding Company Act of 1935, its management filed a plan for reorganization under §§7 and 11 of the Act . . . This plan, as well as two other plans later submitted by Federal, provided for participation by Class B stockholders in the equity of the proposed reorganized company. This feature of the plans was unacceptable to the Commission, and all were ultimately withdrawn. On March 30, 1940, a fourth plan was filed by Federal. This plan, proposing a merger of Federal, Utility Operators Company, and Federal Water and Gas Corporation, a wholly-owned inactive subsidiary of Federal, contained no provision for participation by the Class B stock. Instead, that class of stock was to be surrendered for cancellation, and the preferred and Class A common stock of Federal were to be converted into common stock of the new corporation. As the Commission pointed out in its analysis of the proposed plan, "except for the 5.3% of new common allocated to the present holders of Class A stock, substantially all of the equity of the reorganized company will be given to the present preferred stockholders."

During the period from November 8, 1937, to June 30, 1940, while

the successive reorganization plans were before the Commission, the respondents purchased a total of 12,407 shares of Federal's preferred stock. (The total number of outstanding shares of Federal's preferred stock was 159,269.) These purchases were made on the over-the-counter market through brokers at prices lower than the book value of the common stock of the new corporation into which the preferred stock would have been converted under the proposed plan. If this feature of the plan had been approved by the Commission, the respondents through their holdings of Federal's preferred stock would have acquired more than 10 per cent of the common stock of the new corporation. The respondents frankly admitted that their purpose in buying the preferred stock was to protect their interests in the company.

In ascertaining whether the terms of issuance of the new common stock were "fair and equitable" or "detrimental to the interests of investors" within §7 of the Act, the Commission found that it could not approve the proposed plan so long as the preferred stock acquired by the respondents would be permitted to share on a parity with other preferred stock. The Commission did not find fraud or lack of disclosure, but it concluded that the respondents, as Federal's managers, were fiduciaries and hence under a "duty of fair dealing" not to trade in the securities of the corporation while plans for its reorganization were before the Commission. It recommended that a formula be devised under which the respondents' preferred stock would participate only to the extent of the purchase prices paid plus accumulated dividends since the dates of such purchases. Accordingly, the plan was thereafter amended to provide that the preferred stock acquired by the respondents, unlike the preferred stock held by others, would not be converted into stock of the reorganized company, but could only be surrendered at cost plus 4 per cent interest. The Commission, over the respondents' objections, approved the plan as thus amended, and it is this order which is now under review.

We completely agree with the Commission that officers and directors who manage a holding company in process of reorganization under the Public Utility Holding Company Act of 1935 occupy positions of trust. We reject a lax view of fiduciary obligations and insist upon their scrupulous observance. . . . But to say that a man is a fiduciary only begins analysis; it gives direction to further in-

quiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?

The Commission did not find that the respondents as managers of Federal acted covertly or traded on inside knowledge, or that their position as reorganization managers enabled them to purchase the preferred stock at prices lower than they would otherwise have had to pay, or that their acquisition of the stock in any way prejudiced the interests of the corporation or its stockholders. To be sure, the new stock into which the respondents' preferred stock would be converted under the plan of reorganization would have a book value—which may or may not represent market value—considerably greater than the prices paid for the preferred stock. But that would equally be true of purchases of preferred stock made by other investors. The respondents, the Commission tells us, acquired their stock as the outside world did, and upon no better terms. The Commission dealt with this as a specific case, and not as the application of a general rule formulating rules of conduct for reorganization managers. Consequently, it is a vital consideration that the Commission conceded that the respondents did not acquire their stock through any favoring circumstances. In its own words, "honesty, full disclosure, and purchase at a fair price" characterized the transactions. The Commission did not suggest that, as a result of their purchases of preferred stock, the respondents would be unjustly enriched. On the contrary, the question before the Commission was whether the respondents, simply because they were reorganization managers, should be denied the benefits to be received by the 6,000 other preferred stockholders. Some technical rule of law must have moved the Commission to single out the respondents and deny their preferred stock the right to participate equally in the reorganization. To ascertain the precise basis of its determination, we must look to the Commission's opinion.

The Commission stated that "in the process of formulation of a 'voluntary' reorganization plan, the management of a corporation occupies a fiduciary position toward all of the security holders to be affected, and that it is subjected to the same standards as other fiduciaries with respect to dealing with the property which is the subject matter of the trust." Applying by analogy the restrictions imposed on trustees in trafficking in property held by them in trust



for others, . . . the Commission ruled that even though the management does not hold the stock of the corporation in trust for the stockholders, nevertheless the "duty of fair dealing" which the management owes to the stockholders is violated if those in control of the corporation purchase its stock, even at a fair price, openly and without fraud. The Commission concluded that "honesty, full disclosure, and purchase at a fair price do not take the case outside the rule."

. . . Its opinion plainly shows that the Commission purported to be acting only as it assumed a court of equity would have acted in a similar case. Since the decision of the Commission was explicitly based upon the applicability of principles of equity announced by courts, its validity must likewise be judged on that basis. The grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.

In confining our review to a judgment upon the validity of the grounds upon which the Commission itself based its action, we do not disturb the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct "although the lower court relied upon a wrong ground or gave a wrong reason." . . . The reason for this rule is obvious. It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate. But it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury. Like considerations govern review of administrative orders. If an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment. For purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency.

If, therefore, the rule applied by the Commission is to be judged solely on the basis of its adherence to principles of equity derived from judicial decisions, its order plainly cannot stand. As the Com-

mission concedes here, the courts do not impose upon officers and directors of a corporation any fiduciary duty to its stockholders which precludes them, merely because they are officers and directors, from buying and selling the corporation's stock. (\*) The cases upon which the Commission relied do not establish principles of law and equity which in themselves are sufficient to sustain its order. . . .

Determination of what is "fair and equitable" calls for the application of ethical standards to particular sets of facts. But these standards are not static. In evolving standards of fairness and equity, the Commission is not bound by settled judicial precedents. Congress certainly did not mean to preclude the formulation by the Commission of standards expressing a more sensitive regard for what is right and what is wrong than those prevalent at the time the Public Utility Holding Company Act of 1935 became law. But the Commission did not in this case proffer new standards reflecting the experience gained by it in effectuating the legislative policy. On the contrary, it explicitly disavowed any purpose of going beyond those which the courts had theretofore recognized. Since the Commission professed to decide the case before it according to settled judicial doctrines, its action must be judged by the standards which the Commission itself invoked. And judged by those standards, i.e., those which would be enforced by a court of equity, we must conclude that the Commission was in error in deeming its action controlled by established judicial principles.

But the Commission urges here that the order should nevertheless be sustained because "the effect of trading by management is not measured by the fairness of individual transactions between buyer and seller, but by its relation to the timing and dynamics of the reorganization which the management itself initiates and so largely controls." Its argument lays stress upon the "strategic position enjoyed by the management in this type of reorganization proceeding and the vesting in it of statutory powers available to no other representative of security holders." It contends that these considerations warrant the stern rule applied in this case since the Commission "has dealt extensively with corporate reorganizations, both under the Act, and other statutes entrusted to it," and "has, in addition, exhaustively studied protective and reorganization committees," and

that the situation was therefore "peculiarly within the Commission's special administrative competence."

. . . . .  
... the Commission could take appropriate action for the correction of reorganization abuses found to be "detrimental to the public interest or the interest of investors or consumers." It was entitled to take into account those more subtle factors in the marketing of utility company securities that gave rise to the very grave evils which the Public Utility Holding Act of 1935 was designed to correct. . . .

But the difficulty remains that the considerations urged here in support of the Commission's order were not those upon which its action was based. The Commission did not rely upon "its special administrative competence"; it formulated no judgment upon the requirements of the "public interest or the interest of investors or consumers" in the situation before it. Through its preoccupation with the special problems of utility reorganizations the Commission accumulates an experience and insight denied to others. Had the Commission, acting upon its experience and peculiar competence, promulgated a general rule of which its order here was a particular application, the problem for our consideration would be very different. Whether and to what extent directors or officers should be prohibited from buying or selling stock of the corporation during its reorganization, presents problems of policy for the judgment of Congress or of the body to which it has delegated power to deal with the matter. Abuse of corporate position, influence, and access to information may raise questions so subtle that the law can deal with them effectively only by prohibitions not concerned with the fairness of a particular transaction. But before transactions otherwise legal can be outlawed or denied their usual business consequences, they must fall under the ban of some standards of conduct prescribed by an agency of government authorized to prescribe such standards—either the courts or Congress or an agency to which Congress has delegated its authority. Congress itself did not proscribe the respondents' purchases of preferred stock in Federal. Established judicial doctrines do not condemn these transactions. Nor has the Commission, acting under the rule-making powers

delegated to it by §11 (e), promulgated new general standards of conduct. It purported merely to be applying an existing judge-made rule of equity. The Commission's determination can stand, therefore, only if it found that the specific transactions under scrutiny showed misuse by the respondents of their position as reorganization managers, in that as such managers they took advantage of the corporation or the other stockholders or the investing public. The record is utterly barren of any such showing. Indeed, such a claim against the respondents was explicitly disavowed by the Commission.

In view of the conditions imposed by the Commission in approving the plan, it is clear that the respondents were charged with violation of a positive command of the law rather than with any moral wrong. If there has been a wrong, it would be against the stockholders from whom they purchased the preferred stock at less than the book value of the new stock—which, as we have already said, may or may not be its real value. But the Commission did not regard such stockholders as beneficiaries of the respondents' "trust" and hence entitled to restitution. The Commission did not undo the purchases deemed by it to have been made by the respondents in violation of their fiduciary obligations. Instead, the Commission confirmed the purchases and ordered that the stock be surrendered to the corporation.

Judged, therefore, as a determination based upon judge-made rules of equity, the Commission's order cannot be upheld. Its action must be measured by what the Commission did, not by what it might have done. It is not for us to determine independently what is "detrimental to the public interest or the interest of investors or consumers" or "fair or equitable" within the meaning of §§7 and 11 of the Public Utility Holding Company Act of 1935. The Commission's action cannot be upheld merely because findings might have been made and considerations disclosed which would justify its order as an appropriate safeguard for the interests protected by the Act. There must be such a responsible finding. . . . There is no such finding here.

Congress has seen fit to subject to judicial review such orders of the Securities and Exchange Commission as the one before us. That the scope of such review is narrowly circumscribed is beside the point. For the courts cannot exercise their duty of review unless

they are advised of the considerations underlying the action under review. If the action rests upon an administrative determination—an exercise of judgment in an area which Congress has entrusted to the agency—of course it must not be set aside because the reviewing court might have made a different determination were it empowered to do so. But if the action is based upon a determination of law as to which the reviewing authority of the courts does come into play, an order may not stand if the agency has misconceived the law. In either event the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained. “The administrative process will best be vindicated by clarity in its exercise.” *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 197. What was said in that case is equally applicable here: “We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board.” *Ibid.* . . . In finding that the Commission’s order cannot be sustained, we are not imposing any trammels on its powers. We are not enforcing formal requirements. We are not suggesting that the Commission must justify its exercise of administrative discretion in any particular manner or with artistic refinement. We are not sticking in the bark of words. We merely hold that an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained.

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### “INSISTENCE ON EMPTY FORMALISM”

*City of Yonkers v. United States*

320 U.S. 685, 692 (1944)

In this case, decided less than a year after he wrote his opinion in the *Chenery* case, we find Mr. Justice Frankfurter dissenting for pretty much the same reasons which led Mr. Justice Black to dissent in the *Chenery* case. He felt that the majority was being too rigid in requiring

of the Interstate Commerce Commission formal findings in a situation in which the basis of the Commission's action was quite obvious. He scored his colleagues for insisting on "empty formalism."

The Interstate Commerce Act authorizes the Commission to permit carriers to abandon "all or any portion" of their line of railroad. But this authority of the Commission was not to extend to the abandonment "of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation." The Commission granted the New York Central Railroad Co. a certificate authorizing it to abandon an electric branch extending from a point in New York City to a point in Yonkers. However, the Commission did not formally state that the branch line authorized to be abandoned had functioned as part of a "general steam railroad system of transportation" within the meaning of the section of the Interstate Commerce Act under which it was acting.

In his opinion for the majority, which included Justice Black, Mr. Justice Douglas argued that since the Interstate Commerce Commission's power to authorize parts of a railroad line to be abandoned depended upon certain factors, such an authorization had to be supported by findings showing that it had "jurisdiction" to act: "This is not to insist on formalities and to burden the administrative process with ritualistic requirements. It entails a matter of great substance. It requires the Commission to heed the mandates of the Act and to make the expert determinations which are conditions precedent to its authority to act."

Joined by Justices Reed and Jackson, Mr. Justice Frankfurter dissented:

Congress has empowered the Interstate Commerce Commission to authorize a railroad, when public convenience permits, to abandon any portion of its line. But when such portion is a suburban or interurban electric railway, abandonment may be authorized only if it is part of a general steam railroad system of transportation. . . . This Court has held that whether such a line is of a character to permit abandonment under federal authority need not be determined in the first instance by the Interstate Commerce Commission; and such determination when made does not foreclose an independent judicial judgment. . . . On such an independent examination of the issue the court below had no doubt that the Yonkers branch of the New York Central, the portion of the Central lines for which abandonment was here sought, was not "a suburban or interurban line unconnected with the rest of the Central's railroad system" but was in fact "intertwined with the operation of the [New

York Central Railroad] system as a whole." . . . The record amply sustains this conclusion. If this Court, however, on its own estimate of the various elements in the financial, physical and transportation relations between the rest of the New York Central lines and this Yonkers branch, had struck a contrary balance and found that the Yonkers branch was not operated as a part of the general New York Central system, I should not have deemed the matter of sufficient importance to warrant expression of dissent.

But the Court does not decide on the merits. In effect, it remits the controversy to the Interstate Commerce Commission on the ground that the Commission did not make a formal finding, described as "jurisdictional," that the Yonkers branch was in fact "operated as a part . . . of a general steam railroad system of transportation." The Commission may very well now formally make such a finding of a connection between the Yonkers branch and the New York Central, which in fact is writ large in the Commission's report in granting the application for abandonment, and the weary round of litigation may be repeated to the futile end of having this Court then, forsooth, express an opinion on the merits opposed to that of the Commission and the District Court. This danger if not likelihood of thus marching the king's men up the hill and then marching them down again seems to me a mode of judicial administration to which I cannot yield concurrence. I think the case should be disposed of on the merits by affirming the judgment of the District Court.

This seems to me all the more called for since I find no defect in the foundation of the Commission's order. No doubt the Interstate Commerce Commission like other administrative agencies should keep within legal bounds and courts should keep them there, in so far as Congress has entrusted them with judicial review over administrative acts. Of course when a statute makes indispensable "an express finding," an express finding is imperative. . . . But the history of the Interstate Commerce Act and its amendments illumine the different legal functions expressed by the term findings. When Congress exacts from the Commission formal findings there is an end to the matter. For certain duties of the Commission and at certain stages in the history of the Interstate Commerce Act, Congress did require formal findings, but experience led Congress later to dispense with such formal requirements. . . . But courts have also

spoken of the need of findings as the basis of validity of an order by the Interstate Commerce Commission in the absence of a Congressional direction for findings. The requirement of findings in such a context is merely part of the need for courts to know what it is that the Commission has really determined in order that they may know what to review. "We must know what a decision means before the duty becomes ours to say whether it is right or wrong." . . .

This is the real ground for the decisions which have found Interstate Commerce Commission orders wanting in necessary findings. They have all been cases where the determination of an issue is not open to independent judgment by this Court, and where the case as it came here rested on conflicting inferences of fact left unresolved by the Commission. . . . Findings in this sense is a way of describing the duty of the Commission to decide issues actually in controversy before it. Analysis is not furthered by speaking of such findings as "jurisdictional" and not even when—to adapt a famous phrase—jurisdictional is softened by a *quasi*. "Jurisdiction" competes with "right" as one of the most deceptive of legal pitfalls. The opinions in *Crowell v. Benson*, 285 U.S. 22, and the casuistries to which they have given rise bear unedifying testimony of the morass into which one is led in working out problems of judicial review over administrative decisions by loose talk about jurisdiction.

The nub of the matter regarding the requirement of findings, where the formal making of them is not legislatively commanded, is indicated in *United States v. Louisiana*, 290 U.S. 70. Reviewing the validity of the Commission's order is the serious business of sitting in judgment upon a tribunal of great traditions and large responsibility. An order of the Commission should not be viewed in a hypercritical spirit nor even as though *elegantia juris* were our concern. We should judge a challenged order of the Commission by "the report, read as a whole," 290 U.S. *supra* at 80, and by the record as a whole out of which the report arose.

Viewing its order in this light makes plain enough why the Commission never formally stated that the line which it authorized to be abandoned was in fact operated as part of the New York Central system. It never formally made this statement because it was never questioned before it. On the face of the application, in the report proposed by the Commissioner's examiner, and in the report of the Commission, by Division 4, authorizing the issuance of a certificate



part of the operating system of the New York Central are set forth in detail. Extensive exceptions were taken to the examiner's report by the City of Yonkers and a committee of Yonkers commuters but not even remotely did they take the point which is now made the ground for invalidating the Commission's order. Elaborate petitions for rehearing were filed by the protestants, including the Public Service Commission of New York, as the guardian of the local interests of New York, (\*) but not one of these petitions raised the objection now raised. The jurisdiction of the Commission was questioned, but no claim was made that the Yonkers branch was not an operating part of the New York Central. . . . Exercising the discretion which Congress explicitly conferred upon it, the full Commission denied the petition for rehearing. Interstate Commerce Act, §17 (6). In any fair construction of the action of the Commission such a denial is an adverse finding of such claims as were made in the petitions for rehearing. The crucial fact is that only when the present bill was filed in the court below did the objection which the Court now sustains emerge in the specific claim that the Yonkers "branch is not operated as a part or parts of a general steam railroad system of transportation."

Can there be any doubt that this contention was not put to the Commission because it was an afterthought? This issue was never tendered to the Commission because the facts which deny it were never questioned in the proceedings conducted before it with vigor and ability by several protestants during the three successive stages that preceded a challenge in the courts.

The case is now sent back to the Commission. The facts regarding the relation of the Yonkers branch to the New York Central are spread at large upon the record and are not in controversy. In view of the three proceedings before the Commission it is reasonable to assume that the Commission will add to its report the formal finding now requested of it. If the case then returns here I find it too hard to believe that this Court would reject the conclusion of the Commission and of the lower court that the Yonkers branch is an operating part of the New York Central within §1 (22). Is not insistence on such an empty formalism a reversion to seventeenth century pleading which required talismanic phrases, as for instance that a seller could not be held to warrant that he sold what he purported to sell unless the buyer pleaded *warrantizando vendidit* or *barganizasset*? On the other hand, if the Court with all the facts before

it does not think the Yonkers branch is a part of the railway operations of the New York Central, now is the time to say so.

“THE MISCHIEVOUS FORMULA FOR FIXING UTILITY RATES”

*Driscoll v. Edison Light and Power Co.*

307 U.S. 104, 122 (1939)

*Federal Power Commission v. Hope Natural Gas Co.*

320 U.S. 591, 624 (1944)

Writing in 1930, Mr. Frankfurter called attention to the virtual breakdown in the effective administration of systems of utility rate regulation and blamed the courts for the situation. He singled out for special condemnation the way the courts were applying the rule which the Supreme Court had set down in 1898 for determining a rate base. (*Smyth v. Ames*, 169 U.S. 466.) Regarding the consequences of the application of this rule, Mr. Frankfurter wrote:

“The heart of the difficulty is the current judicial approach to utility valuation. Out of the constitutional provision safeguarding property against deprivation ‘without due process of law,’ the Supreme Court has evolved a doctrine that a utility is entitled to a fair return on its present ‘value,’ and ‘value’ must be ascertained by giving weight, among other things, to estimates of what it would cost to reproduce the property at the time of the rate hearing. The Supreme Court has not given us a calculus of present value, and it has left in conscious obscurity the amount of weight to be given reproduction cost. Some of its language has, however, induced commissions and lower courts to find that controlling effect should be given to such cost.

“The doctrine was originally urged upon the Supreme Court by William Jennings Bryan, on behalf of agricultural communities, after the depression following the panic of 1893 as a protection against inflated claims based on what were then deemed inflated prices of the past, and in order to justify reduction of railroad rates. . . . What thus served as an empiric device for preventing swollen returns on fictitious values, has in the course of time, . . . been turned into the most luxurious means for creating fictitious values. And for this economic legerdemain, constitutional sanction has been sought.” *The Public and its Government*, pp. 101-103.

A utility rate case argued only a week after he took his place on the Bench gave Justice Frankfurter an early opportunity to resume his criticism of what he has called the "mischievous formula" of *Smyth v. Ames*. The Pennsylvania Public Utilities Act empowers the state's Public Utilities Commission to fix temporary rates pending final determination of a rate proceeding. These rates were to be sufficient to provide a return of not less than five per cent upon original cost, less depreciation. Permanent rates were to be "just and reasonable." However, in fixing the base for temporary rates, the Commission did not confine itself to the single factor of original cost less depreciation, but interpreted the section of the statute dealing with temporary rates as requiring that, in compliance with the rule laid down in *Smyth v. Ames*, weight be given also to reproduction cost, going concern value, and the necessity for working capital.

In an opinion by Mr. Justice Reed, the Supreme Court accepted this determination. Justice Frankfurter voted for the result, but wrote a brief opinion, in which Justice Black concurred, expressing regret that the Court should be giving "new vitality" to the rule of *Smyth v. Ames* and discussing the difficulties which have followed from it. He wrote in the *Driscoll* case:

The decree below was clearly wrong. But in reversing it, the Court's opinion appears to give new vitality needlessly to the mischievous formula for fixing utility rates in *Smyth v. Ames*, 169 U.S. 466. The force of reason, confirmed by events, has gradually been rendering that formula moribund by revealing it to be useless as a guide for adjudication. Experience has made it overwhelmingly clear that *Smyth v. Ames* and the uses to which it has been put represented an attempt to erect temporary facts into legal absolutes. The determination of utility rates—what may fairly be exacted from the public and what is adequate to enlist enterprise—does not present questions of an essentially legal nature in the sense that legal education and lawyers' learning afford peculiar competence for their adjustment. These are matters for the application of whatever knowledge economics and finance may bring to the practicalities of business enterprise. The only relevant function of law in dealing with this intersection of government and enterprise is to secure observance of those procedural safeguards in the exercise of legislative powers which are the historic foundations of due process.

Mr. Justice Bradley nearly fifty years ago made it clear that the real issue is whether courts or commissions and legislatures are the

ultimate arbiters of utility rates (dissenting, in *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U.S. 418, 461). Whatever may be thought of the wisdom of a broader judicial role in the controversies between public utilities and the public, there can be no doubt that the tendency, for a time at least, to draw fixed rules of law out of *Smyth v. Ames* has met the rebuff of facts. At least one important state has for decades gone on its way unmindful of *Smyth v. Ames*, and other states have by various proposals sought to escape the fog into which speculations based on *Smyth v. Ames* have enveloped the practical task of administering systems of utility regulation.

*Smyth v. Ames* should certainly not be invoked when it is not necessary to do so. The statute under which the present case arose represents an effort to escape *Smyth v. Ames* at least as to temporary rates. It is the result of a conscientious and informed endeavor to meet difficulties engendered by legal doctrines which have been widely rejected by the great weight of economic opinion, (\*) by authoritative legislative investigations, (\*) by utility commissions throughout the country, (\*) and by impressive judicial dissents. (\*) As a result of this long process of experience and reflection, the two states in which utilities play the biggest financial part—New York and Pennsylvania—have evolved the so-called recoupment scheme for temporary rate-fixing (thereby avoiding some of the most wasteful aspects of rate litigation) as a fair means of accommodating public and private interests. It is a carefully guarded device for securing “a judgment from experience as against a judgment from speculation,” *Tanner v. Little*, 240 U.S. 369, 386, in dealing with a problem of such elusive economic complexity as the determination of what return will be sufficient to attract capital in the special setting of a particular industry and at the same time be fair to the public dependent on such enterprise.

\* \* \*

Since the decision in *Driscoll v. Edison Light and Power Co.*, the Supreme Court has been moving in the direction urged by Mr. Justice Frankfurter in that case. Curiously enough, however, he has taken exception to much of what his present colleagues have said and done in this field.

In 1942, the Court upheld the action of the Federal Power Commission in fixing a rate without considering all the elements contemplated by *Smyth v. Ames*. *Federal Power Commission v. Natural Gas Pipeline Co.*, 315 U.S. 575. Chief Justice Stone had written for the Court: “The

Constitution does not bind rate-making bodies to the service of any single formula or combination of formulas. Agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances. Once a fair hearing has been given, proper findings made and other statutory requirements satisfied, the courts cannot intervene in the absence of a clear showing that the limits of due process have been overstepped. If the Commission's order, as applied to the facts before it and viewed in its entirety, produces no arbitrary result, our inquiry is at an end."

In a joint concurrence, Justice Black, Douglas, and Murphy let it be known that it was their belief that in the absence of statutory authorization the due process clause of the Fifth Amendment does not empower the Court to invalidate a rate order because it finds the charges to be unreasonable. They would have liked to see the Court seize the opportunity to make a bolder pronouncement: "While the opinion of the Court erases much which has been written in rate cases during the last half century, we think this is an appropriate occasion to lay the ghost of *Smyth v. Ames* . . . which has haunted utility regulation since 1898. That is especially desirable lest the reference by the majority to 'constitutional requirements' and to 'the limits of due process' be deemed to perpetuate the fallacious 'fair value' theory of rate making in the limited judicial review provided by the Act."

First announcing that he "wholly" agreed with the opinion of the Chief Justice, Mr. Justice Frankfurter went on to state in his one-page opinion in this case that since all the members of the Court joined in upholding the Commission's order, any discussion of whether the rule against "confiscation" was ultimately to be enforced by the courts was purely "academic." He pointed out that the Natural Gas Act definitely authorized judicial review of Commission orders, and that even the Justices who resisted at the turn of the century inroads on legislative power over utilities accepted judicial review as a corollary to the rule against confiscation.

Two years later the views of Justices Black, Douglas, and Murphy received majority support. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591. Justice Douglas wrote the Court's opinion, which held that "the result reached" and "not the method employed" in computing the rate determines whether the Commission has met the duty imposed upon it by the Natural Gas Act of 1938 to see to it that the rates are "just and reasonable." "It is not theory," observed Justice Douglas, "but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end. The fact that the method em-

ployed to reach that result may contain infirmities is not then important." If the criteria for fixing rates are constitutional, the administrative determination is constitutional if it adheres to the statutory tests.

Justices Reed, Frankfurter, and Jackson wrote separate opinions, disapproving of the way in which the Court was disposing of the case. Justice Frankfurter continued to insist that the last word as to the reasonableness of rates lies with the courts—at least where Congress has imposed the duty of review—a contention which impelled Justices Black and Murphy to pen a brief opinion in order to be able to say that it was "a wholly gratuitous assertion as to Constitutional law." Mr. Justice Frankfurter said in dissent:

My brother JACKSON has analyzed with particularity the economic and social aspects of natural gas as well as the difficulties which led to the enactment of the Natural Gas Act, especially those arising out of the abortive attempts of States to regulate natural gas utilities. The Natural Gas Act of 1938 should receive application in the light of this analysis, and MR. JUSTICE JACKSON has, I believe, drawn relevant inferences regarding the duty of the Federal Power Commission in fixing natural gas rates. His exposition seems to me unanswered, and I shall say only a few words to emphasize my basic agreement with him.

For our society the needs that are met by public utilities are as truly public services as the traditional governmental functions of police and justice. They are not less so when these services are rendered by private enterprise under governmental regulation. Who ultimately determines the ways of regulation, is the decisive aspect in the public supervision of privately-owned utilities. Foreshadowed nearly sixty years ago, Railroad Commission Cases, 116 U.S. 307, 331, it was decided more than fifty years ago that the final say under the Constitution lies with the judiciary and not the legislature. Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U.S. 418.

While legal issues touching the proper distribution of governmental powers under the Constitution may always be raised, Congressional acquiescence to date in the doctrine of Chicago, M. & St. P. Ry. Co. v. Minnesota, supra, may fairly be claimed. But in any event that issue is not here in controversy. As pointed out in the opinions of my brethren, Congress has given only limited authority to the Federal Power Commission and made the exercise of that authority subject to judicial review. The Commission is authorized

to fix rates chargeable for natural gas. But the rates that it can fix must be "just and reasonable." . . . Instead of making the Commission's rate determination final, Congress specifically provided for court review of such orders. To be sure, "the finding of the Commission as to the facts, if supported by substantial evidence" was made "conclusive" . . . But obedience of the requirement of Congress that rates be "just and reasonable" is not an issue of fact of which the Commission's own determination is conclusive. Otherwise, there would be nothing for a court to review except questions of compliance with the procedural provisions of the Natural Gas Act. Congress might have seen fit so to cast its legislation. But it has not done so. It has committed to the administration of the Federal Power Commission the duty of applying standards of fair dealing and of reasonableness relevant to the purposes expressed by the Natural Gas Act. The requirement that rates must be "just and reasonable" means just and reasonable in relation to appropriate standards. Otherwise Congress would have directed the Commission to fix rates as in the judgment of the Commission are just and reasonable; it would not have also provided that such determinations by the Commission are subject to court review.

To what sources then are the Commission and the courts to go for ascertaining the standards relevant to the regulation of natural gas rates? It is at this point that MR. JUSTICE JACKSON's analysis seems to me pertinent. There appear to be two alternatives. Either the fixing of natural gas rates must be left to the unguided discretion of the Commission so long as the rates it fixes do not reveal a glaringly bad prophecy of the ability of a regulated utility to continue its service in the future. Or the Commission's rate orders must be founded on due consideration of all the elements of the public interest which the production and distribution of natural gas involve just because it is natural gas. These elements are reflected in the Natural Gas Act, if that Act be applied as an entirety. . . . Of course the statute is not concerned with abstract theories of rate-making. But its very foundation is the "public interest," and the public interest is a texture of multiple strands. It includes more than contemporary investors and contemporary consumers. The needs to be served are not restricted to immediacy, and social as well as economic costs must be counted.

It will not do to say that it must be left to the skill of experts. Expertise is a rational process and a rational process implies expressed reasons for judgment. It will little advance the public interest to substitute for the hodge-podge of the rule in *Smyth v. Ames*, 169 U.S. 466, an encouragement of conscious obscurity or confusion in reaching a result, on the assumption that so long as the result appears harmless its basis is irrelevant. That may be an appropriate attitude when state action is challenged as unconstitutional. cf. *Driscoll v. Edison Co.*, 307 U.S. 104. But it is not to be assumed that it was the design of Congress to make the accommodation of the conflicting interests exposed in Mr. JUSTICE JACKSON'S opinion the occasion for a blind clash of forces or a partial assessment of relevant factors, either before the Commission or here.

The objection to the Commission's action is not that the rates granted were too low but that the range of its vision was too narrow. And since the issues before the Commission involved no less than the total public interest, the proceedings before it should not be judged by narrow conceptions of common law pleading. And so I conclude that the case should be returned to the Commission. In order to enable this Court to discharge its duty of reviewing the Commission's order, the Commission should set forth with explicitness the criteria by which it is guided in determining that rates are "just and reasonable," and it should determine the public interest that is in its keeping in the perspective of the considerations set forth by Mr. JUSTICE JACKSON.

"STERILE ATTEMPTS AT DIFFERENTIATION BETWEEN 'FACT'  
AND 'LAW'"

*Trust Under the Will of Bingham v. Commissioner of  
Internal Revenue*

325 U.S. 365, 377 (1945)

One of the criteria developed by the courts for determining the scope of judicial review of administrative decisions differentiates so-called questions of "fact" from questions of "law." According to this distinction, administrative findings as to the facts, if supported by substantial evidence, are binding on the courts. Decisions by the agency



regarding legal matters, on the other hand, are presumably subject to independent examination by the reviewing court. The phases of administrative action which ought to come under judicial scrutiny were once described by Mr. Justice Brandeis in these words: "The supremacy of law demands that there shall be opportunity to have some court decide whether an erroneous rule of law was applied; and whether the proceeding in which facts were adjudicated was conducted regularly." (Concurring in *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 84.)

But both scholars and jurists have for a long time now questioned the utility of the dichotomy between fact and law as criteria for judicial review of administrative action. In the opinion printed below, Justice Frankfurter discusses the difficulties in trying to apply this distinction to the work of the Tax Court, handling as it does enormously technical problems arising in tax litigation. Chief Justice Stone's opinion for the Court held that there was no error of law in the Tax Court's determination that expenses incurred by trustees in contesting an income-tax deficiency assessment and in winding up the trust after its expiration were deductible as expenses for the "management of property held for the production of income." The Circuit Court of Appeals had set aside the determination on the ground that such expenses were not for the production of income nor for the management of property held for the production of income.

Mr. Justice Frankfurter joined in reversing the Circuit Court of Appeals, but filed a concurring opinion surveying the attitude and criteria which he believes ought to govern judicial review of Tax Court determinations:

This is one of those cases in which the ground of the decision is more important than the decision itself, except to the parties. And so, while I concur in the result, I feel bound to say that I think the manner in which it is reached is calculated to increase the already ample difficulties in judicial review of Tax Court determinations. The course of our decisions since *Dobson v. Commissioner*, 320 U.S. 489, calls for clarification and avoidance of further confusion.

In *Dobson v. Commissioner*, *supra*, this Court elaborately considered the special function of the Tax Court and the very limited functions of the Circuit Courts of Appeals and of this Court in reviewing the Tax Court. The unanimous opinion in the *Dobson* case was surely a case of much ado about nothing, if it did not emphasize the vast range of questions as to which the Tax Court

should have the final say. In making the Dobson pronouncement, the Court was not unaware that "questions of fact" and "questions of law" were legal concepts around which dialectic conflicts have been fought time out of mind. The Dobson opinion took for granted that they are useful instruments of thought even though not amenable to fixed connotations. The terms are unmanageable and too confusing if it be assumed that unless they have invariant meaning, that is, unless they serve the same purpose for every legal problem in which they are invoked, they can serve no purpose for any problem. The contribution of the Dobson case, one had a right to believe, was the restriction of reviewable "questions of law" in tax litigation to issues appropriate for review in relation to the machinery which Congress has designed for such litigation. The Dobson case eschewed sterile attempts at differentiation between "fact" and "law" in the abstract. Instead, it found significance in the scheme devised by Congress for adjudicating tax controversies whereby Congress had, in the main, centralized in the Tax Court review of tax determinations by the Treasury and had made the decisions of the Tax Court final unless they were "not in accordance with law," . . . with the result that, as a practical matter, only a small percentage of Tax Court decisions gets into the Circuit Courts of Appeals, and a still smaller percentage reaches this Court. (\*) Therefore, the decisions of the Circuit Courts of Appeals, and even more so of this Court, are bound to be more or less episodic and dependent upon contingencies that cannot give these appellate courts that feel of the expert which is so important for wise construction of such interrelated and complicated enactments as those which constitute our revenue laws. These factors, so decisive in the stream of tax litigation, weigh heavily in apportioning functions between the Tax Court and the courts reviewing the Tax Court. Accordingly, the vital guidance of the Dobson opinion was that a decision of the Tax Court should stand unless it involves "a clear-cut mistake of law" . . . Considerations that may properly govern what are to be deemed questions of fact and questions of law as between judge and jury, or considerations relevant to the drawing of a line between questions of fact and questions of law on appeal from a court of first instance sitting without a jury, or in determining what is a foreclosed question of fact in cases coming to this Court from State courts on claims of unconstitutionality,

may be quite misleading when a decision of the Tax Court is challenged in the various Circuit Courts of Appeals or here as "not in accordance with law."

Certainly, all disputed questions regarding events and circumstances—the raw materials, as it were, of situations which give rise to tax controversies—are for the Tax Court to settle and definitively so. Secondly, there are questions that do not involve disputes as to what really happened—as, for instance, what expenses were incurred or what distribution of assets was made—but instead turn on the meaning of what happened as a matter of business practice or business relevance. Here we are in the domain of financial and business interpretation in relation to taxation as to which the Tax Court presumably is as well informed by experience as are the appellate judges and certainly more frequently enlightened by the volume and range of its litigation. Such issues bring us treacherously near to what abstractly are usually characterized as questions of law, whether the question of division of labor in a litigation is between judges and lay juries, or between judges of first instance and of appellate courts when there is no difference of specialized experience between the two classes of judges. Thus, the construction of documents has for historic reasons been deemed to be a question of law in the sense that the meaning is to be given by judges and not by laymen. But this crude division between what is "law" and what is "fact" is not relevant to the proper demarcation of functions as between the Tax Court and the reviewing courts. To hold that the Circuit Courts of Appeals, and eventually this Court, must make an independent examination of the meaning of every word of tax legislation, no matter whether the words express accounting, business or other conceptions peculiarly within the special competence of the Tax Court, is to sacrifice the effectiveness of the judicial scheme designed by Congress especially for tax litigation to an abstract notion of "law" derived from the merely historic function of courts generally to construe documents, including legislation. More than that. If the appellate courts must make an independent examination of the meaning of every word in tax legislation, on the assumption that the construction of legislative language is necessarily for the appellate courts, how can they reasonably refuse to consider claims that the words have been misapplied in the circumstances of a particular case? Meaning

derives vitality from application. Meaning is easily thwarted or distorted by misapplication. If the appellate courts are charged with the duty of giving meaning to words because they are contained in tax legislation, they equally cannot escape the duty of examining independently whether a proper application has been given by the Tax Court.

The specialized equipment of the Tax Court and the trained instinct that comes from its experience ought to leave with the Tax Court the final say also as to matters which involve construction of legal documents and the application of legislation even though the process may be expressed in general propositions, so long as the Tax Court has not committed what was characterized in the *Dobson* case as a "clear-cut mistake of law."

That serves as a guide for judgment even though no inclusive definition or catalogue is essayed. The Tax Court of course must conform to the procedural requirements which the Constitution and the laws of Congress command. Likewise, in applying the provisions of the revenue laws, the Tax Court must keep within what may broadly be called the outward limits of categories and classifications expressing legislative policy. Congress has invested the Tax Court with primary—and largely with ultimate—authority for redetermining deficiencies. It is a tribunal to which mastery in tax matters must be attributed. The authority which Congress has thus given the Tax Court involves the determination of what really happened in a situation and what it means in the taxing world. In order to redetermine deficiencies the Tax Court must apply technical legal principles. The interpretation of tax statutes and their application to particular circumstances are all matters peculiarly within the competence of the Tax Court. On the other hand, constitutional adjudication, determination of local law questions and common law rules of property, such as the meaning of a "general power of appointment" or the application of the rule against perpetuities, are outside the special province of the Tax Court. . . . Congress did not authorize review of all legal questions upon which the Tax Court passed. It merely allowed modification or reversal if the decision of the Tax Court is "not in accordance with law." But if a statute upon which the Tax Court unmistakably has to pass allows the Tax Court's application of the law to the situation before it as a reasonable one—if the situation could, with-

out violence to language, be brought within the terms under which the Tax Court placed it or be kept out of the terms from which that Court kept it—the Tax Court cannot in reason be said to have acted “not in accordance with law.” In short, there was no “clear-cut mistake of law” but a fair administration of it.

If these considerations are to prevail, the sole question before a Circuit Court of Appeals is whether the decision by the Tax Court presents a “clear-cut mistake of law.” There should be an end of the matter once it is admitted that the application made by the Tax Court was an allowable one. If a question becomes a reviewable question in tax cases because, abstractly considered, it may be cast into a “pure question of law,” it would require no great dialectical skill to throw most questions which are appealed from the Tax Court into questions of law independently reviewable by the Circuit Courts of Appeals. The road would be open to a new insistence for increased tax reviews by this Court on *certiorari*. The intention of the Dobson case was precisely otherwise. It was to centralize responsibility in the Tax Court, to minimize isolated intrusions by the Circuit Courts of Appeals into the technical complexities of tax determinations except when the Tax Court has clearly transcended its specialized competence, and to discourage resort to this Court in tax cases except where conflict among the circuits or constitutional questions or a “clear-cut mistake of law” of real importance may call for our intervention.

Let us apply these governing considerations to the case in hand. The trustees here paid, as expenses in connection with the trust, certain legal fees, and these charges they deducted from the gross trust income for 1940. The Commissioner disallowed these deductions. The legal services concerned (1) litigation in which the trustees unsuccessfully contested a deficiency claim based on taxable gain to the estate, (2) payment of a legacy, and (3) problems arising from the expiration of the trust and the disposition of its assets. The sole question before the Tax Court was whether these fees and charges were deductible as expenses incurred “for the management, conservation, or maintenance of property held for the production of income” under §121 (a) of the Revenue Act of 1942 . . .

Whether these payments constituted expenses “for the management . . . of property held for the production of income,” may as

fairly be said to be a question of fact, namely, the purpose which these payments served with relation to property held for the production of income, as it could be said that they involve a proper construction of what the statute means by "management" of such property. The truth of the matter is that the problem involves a judgment regarding the interplay of both questions, namely, what relation do these payments have to what may properly be deemed the managerial duties of trustees. It is possible to transform every so-called question of fact concerning the propriety of expenses incurred by trustees into a generalized inquiry as to what the duties of a trustee are and, therefore, whether a particular activity satisfied the conception of management which trusteeship devolves upon a trustee. Such a way of dealing with these problems inevitably leads to casuistries which are to be avoided by a fair distribution of functions between the Tax Court and the reviewing courts. The fact that this problem may be cast in the form of intellectually disinterested abstractions goes a long way to prove that its solution should be left with the Tax Court.

If the decision by the Tax Court may fairly be deemed to have been restricted to the facts of this case, as it may, it certainly would be an issue of "fact." But even assuming that the "issues are broader than the particular facts presented" by this case, the Tax Court's decision is not deprived of finality. Yet an assumption to the contrary is at the core of the Government's argument. Simply because the correctness of "certain general propositions" is involved does not make the position taken by the Tax Court a question of law. The real question is: What is the nature of the issue upon which the Tax Court has pronounced? If the issue presents a difficulty which it is peculiarly within the competence of the Tax Court to resolve and that court has given a fair answer, every consideration which led to the pronouncement in the Dobson case should preclude independent reexamination of the Tax Court's disposition. Regardless of what the question may be termed for purposes of review, the Tax Court's determination should be accorded finality. That the Tax Court has expressed an allowable opinion as to the meaning and application of a tax provision, here §121 (a) of the 1942 Revenue Act, should suffice to reinstate its decision, without opening the sluices to independent review by the Circuit Courts of Appeals and this Court of multitudinous tax

questions. Such is the principle or rule of judicial administration which should guide review of Tax Court determinations.

“COURTS ACT AS COURTS AND NOT AS ADMINISTRATIVE ADJUNCTS”

*Penfield Co. v. Securities and Exchange Commission*

330 U. S. 585, 603 (1947)

A federal District Court found an officer of the Penfield Co. guilty of contempt for failing to comply with a subpoena issued by the Securities and Exchange Commission. It imposed a fifty-dollar fine, but refused to force him to produce the subpoenaed documents. He paid the fine and took no appeal. The Commission appealed to the Circuit Court of Appeals, which ordered that the defendant be imprisoned until he produced the documents.

In an opinion by Justice Douglas, the Supreme Court held that the District Court abused its discretion when it declined to grant coercive relief, and that the Circuit Court of Appeals had power to order that a prison term be substituted for the fine. Mr. Justice Frankfurter, with whom Justice Jackson concurred, dissented, saying in part:

Beginning with the Interstate Commerce Act in 1887, it became a conventional feature of Congressional regulatory legislation to give administrative agencies authority to issue subpoenas for relevant information. Congress has never attempted, however, to confer upon an administrative agency itself the power to compel obedience to such a subpoena. It is beside the point to consider whether Congress was deterred by constitutional difficulties. That Congress should so consistently have withheld powers of testimonial compulsion from administrative agencies discloses a policy that speaks with impressive significance.

Instead of authorizing agencies to enforce their subpoenas, Congress has required them to resort to the courts for enforcement. In the discharge of that duty courts act as courts and not as administrative adjuncts. The power of Congress to impose on courts the duty of enforcing obedience to an administrative subpoena was sustained precisely because courts were not to be automata carrying out the wishes of the administrative. They were discharging judicial power with all the implications of the judicial function in

our constitutional scheme. . . . Accordingly, an order directing obedience to a subpoena by the Securities and Exchange Commission, like a subpoena of any other federal agency, does not issue as a matter of course. An administrative subpoena may be contested on the ground that it exceeds the bounds set by the Fourth Amendment against unreasonable search and seizure; that the inquiry is outside the scope of the authority delegated to the agency; that the testimony sought to be elicited is irrelevant to the subject matter of the inquiry; that the person to whom it is directed cannot be held responsible for the production of the papers. . . .

In this case, the Securities and Exchange Commission issued a subpoena to Young, as officer of the Penfield Company, for the production of books and records of the company covering the period May 1, 1939, to April 9, 1943. Upon Young's failure to comply, the Commission applied to the District Court, on April 13, 1943, for an order compelling obedience. From this order an appeal was taken to the Circuit Court of Appeals which affirmed the order on June 30, 1944, . . . its mandate being spread on the record of the District Court on December 7, 1944. Young having persisted in his refusal to comply, the Securities and Exchange Commission, on January 24, 1945, applied for a rule to show cause why he should not be cited for contempt. The District Court postponed final hearings on the order to show cause, pending, apparently, the completion of a criminal trial of Young and the Penfield Company then before the Court, on an indictment growing out of the inquiry for which the subpoena had been issued. It was not until July 2, 1945, after the petitioners had been acquitted in the criminal proceeding, that the rule to show cause was heard.

The District Court found petitioner Young guilty of contempt of court for disobedience of its order of June 1, 1943, requiring the production of records called for by the subpoena issued by the S.E.C. But the Court refused the Government's request to impose a contingent punishment to secure production of the records. Instead, it sentenced Young to the payment of a fine of \$50. Without objection Young paid this fine, and consistently thereafter maintained that by such payment judicial power had exhausted itself. . . . The Government appealed from this disposition by the District Court on the ground that the District Court, having adjudged



Young to be in contempt, erred in ordering Young to pay a fine of \$50 and stand committed until the fine was paid, instead of imposing a remedial penalty, calculated to coerce Young to produce or allow inspection of the books and records of the Penfield Co., pursuant to the order of June 1, 1943. On the basis of this appeal, which challenged what the District Court did and what it refused to do, the Circuit Court of Appeals, one judge dissenting, reversed the order of the lower court: "The order imposing the fine is reversed and the case remanded to the district court for an order requiring Young's imprisonment to compel his obedience to the order to produce the documents in question." . . . This Court then granted certiorari, the petition for which asked this Court to "reverse the judgment and order of the Circuit Court of Appeals in this case." There was thus properly before the Circuit Court of Appeals the judgment imposing the fine of \$50 and refusing to give coercive remedy, and there is accordingly before us the correctness of the judgment of the Circuit Court of Appeals setting aside the \$50 fine and ordering a coercive decree.

The judgment immediately before us is that of the Circuit Court of Appeals setting aside the fine imposed by the District Court and reversing its refusal to issue a coercive order. The ultimate question is the correctness of what the District Court did and what it refused to do. It is essential therefore to focus attention on the precise circumstances in which the District Court acted as it did. This is what the record tells us:

"Mr. Cuthbertson: So far as the punishment which the Court might see fit to impose, that is up to the Court. We are still anxious to get a look at these books and records, so I suggest to the Court, if he be so disposed, whatever punishment the Court might see fit to impose would be in connection with or so long as he refused to produce his books and records for our inspection.

"The Court: I don't think that I am going to be disposed to do anything like that. I sat here for six weeks and listened to books and records. The Government produced people from all over the United States in connection with the Penfield matter.

"Mr. Cuthbertson: I might say, your Honor, that we have in mind that these books and records may disclose certain acts other

than those charged in the indictment. We don't propose to go over the same matter that the Court went over in connection with the criminal case.

"The Court: The Court can take judicial notice of its own books and records, and in that trial the evidence was clear and definite and positive from all of the Government's witnesses, that during one period of time this defendant had nothing whatsoever to do with the Penfield Company. Whether that period of time is covered by what the Securities and Exchange Commission seeks or not, I don't know.

"The judgment and sentence of the Court is that the defendant pay a fine of \$50, and stand committed until paid."

Bearing in mind that the District Court was not an automaton which must unquestionably compel obedience to a subpoena simply because the Commission had issued it, we must consider whether the District Court had abused the fair limits of judicial discretion. If a district court believes that howsoever relevant a demand for documents may have been at the time it was made, circumstances had rendered the subpoena obsolete, it is entitled to consider the merits of the subpoena as of the time that its enforcement is sought and not as of the time that it was issued. The above colloquy means nothing unless it means that Judge Hall was of the view that events had apparently rendered needless the call from Young for the documents. He may have been wrong in that belief. At all events it was the view of a judge who had presided for six weeks over a trial in which these matters were canvassed. The Circuit Court of Appeals did not have before it, nor have we, the knowledge or the basis for knowledge that Judge Hall had, and so neither court can say with any confidence that he did not have ground for thinking that the change in circumstances revealed in the course of the trial obviated the need for the demand that was made upon Young. We surely ought not to reverse the action of the district judge on the abstract assumption that papers ordered to be produced as relevant to an inquiry at the time the subpoena issued continued relevant several months later. We ought not to assume that a subpoena was proper months later when a proceeding lasting more than six weeks before the judge who had approved the subpoena in the first instance persuaded him that the circumstances no longer

called for carrying out the terms of the subpoena. When the trial judge stated his understanding that the intervening circumstances had rendered inappropriate the use of his coercive powers, counsel for the Government did not gainsay the judge's view. . . . The significance of counsel's silence is its confirmation of the judge's interpretation of the circumstances. At least in the absence of contradiction, the interpretation of the facts by the trial judge was a proper basis for the exercise of his judicial discretion.

On the record before us, Judge Hall exercised allowable discretion in finding that the subpoena had spent its force, and in concluding not to compel obedience to it. At the same time, he was justified in finding that because Young had disobeyed the subpoena while it was still alive, he should be fined and made to feel that one cannot flout a court's authority with impunity.

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